



June 24, 2019

VIA EMAIL

U.S. Army Freedom of Information Act Office
Records Management and Declassification Agency
9301 Chapek Rd. Bldg 1458
Fort Belvoir, VA 22060-5605
usarmy.belvoir.hqda-oaa-ahs.mbx.rmda-foia@mail.mil

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

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer(s):

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Defense (DOD), 38 C.F.R. Part 286, and the Army, 32 C.F.R. Part 518.8, American Oversight makes the following request for records.

The president has appointed former Secretary of the Army Mark Esper to serve as Acting Secretary of Defense, and reports indicate that the president will nominate Mr. Esper to serve as Secretary of Defense in a permanent capacity.¹ Mr. Esper previously served as a lobbyist for the defense contractor Raytheon,² which raises concerns about the matters that Mr. Esper has influenced or may influence in his service in the Army and at DOD.

American Oversight seeks records with the potential to shed light on Mr. Esper's service as Secretary of the Army and Acting Secretary of Defense and his compliance with ethics rules, particularly regarding matters related to his former employer, in advance of Mr. Esper's nomination to serve as Secretary of Defense in a permanent capacity.

¹ Helene Cooper, *Trump to Officially Nominate Esper as Next Defense Secretary*, N.Y. TIMES, June 21, 2019, <https://www.nytimes.com/2019/06/21/us/politics/mark-esper-defense-secretary-nomination.html>.

² *Id.*



Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that the Department of Defense (DOD) and the Army produce the following records as soon as practicable, and at least within twenty business days:

1. Any conflicts or ethics waivers or authorizations for former Secretary of the Army and current Acting Secretary of Defense Mark Esper, including authorizations pursuant to 5 C.F.R. § 2635.502.
2. Records reflecting any recusal determination made or issued for former Secretary of the Army and current Acting Secretary of Defense Mark Esper.

Please provide all responsive records from November 20, 2017, through the date the search is conducted.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's 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 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 operations or activities of the government."³ The public has a significant interest in the activities, communications, and ethical compliance of Mr. Esper during his time serving as Secretary of the Army and Acting Secretary of Defense. Records with the potential to shed light on Mr. Esper's compliance with his ethical obligations, and his involvement, meetings, or communications with external entities or affecting external entities would contribute significantly to public understanding of operations of the federal government, including Mr. Esper has communicated with, or been involved in matters affecting, his former employer. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, 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 for non-commercial purposes.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

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.⁵

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.⁶ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;⁷ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;⁸ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;⁹ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁰ posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make

⁵ 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 June 20, 2019); American Oversight (@weareoversight), TWITTER,

<https://twitter.com/weareoversight> (last visited June 20, 2019).

⁶ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁷ DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>.

⁸ See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

⁹ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁰ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), 32 C.F.R. Part 518.8(d)(2) and 38 C.F.R. Part 286.8(e), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. There is an urgent need to inform the public regarding Acting Secretary Esper's performance in his role as Secretary of the Army, including regarding his compliance with ethics rules and his involvement in matters affecting his former employer, defense contractor Raytheon. In the short time since the president appointed Mr. Esper to be Acting Secretary of Defense and indicated his intention to nominate him to serve in that role in a permanent capacity, there has been significant public interest in Mr. Esper's performance as Secretary of the Army and his ties to Raytheon.¹²

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Esper's performance of his duties as Secretary of the Army and as Acting Secretary of Defense, including his compliance with ethical requirements and any influence he has had over matters that affect his former employer, in light of Mr. Esper's likely nomination to serve as Secretary of Defense in a permanent capacity.¹³ Mr. Esper's imminently pending nomination, and subsequent Senate confirmation process, to serve as Secretary of Defense in a permanent capacity is exactly

¹¹ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹² Jacqueline Feldscher, *Why the Acting Defense Secretary May Have to Sit Out Turkey Missile Talks*, POLITICO (June 19, 2019, 5:27 PM), <https://www.politico.com/story/2019/06/19/mark-esper-turkey-negotiations-1541664>; Karl Evers-Hillstrom & Reid Champlin, *Boeing Executive Out, Raytheon Lobbyist In to Lead Pentagon*, OPENSECRETS.ORG, June 18, 2019, <https://www.opensecrets.org/news/2019/06/raytheon-lobbyist-mark-esper-to-lead-pentagon/>; Charles Tiefer, *Appointment of Esper as Acting Secretary Worsens Trump Tilt Toward Lobbyists*, FORBES (June 18, 2019, 6:58 PM), <https://www.forbes.com/sites/charlestiefer/2019/06/18/lobbyist-esper-as-acting-defense-secretary-worsens-trump-tilt-to-lobbyists/#2434edaa4368>.

¹³ Cooper, *supra* note 1.

the type of “matter of a current exigency to the American public”¹⁴ that courts have found justifies expedited processing of FOIA requests. The public must have access to the requested information in a timely manner in order to effectively petition their representatives to vote to confirm or reject Mr. Esper’s nomination to an extraordinarily powerful and important office.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁵ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”¹⁶ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.¹⁷ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁸

¹⁴ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469).

¹⁵ See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁶ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁷ 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>

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<https://twitter.com/weareoversight> (last visited June 20, 2019).

¹⁸ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.’s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration’s Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to>

Accordingly, American Oversight's request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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 for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁹ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain

[sell-nuclear-technology-to-saudi-arabia](#); *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁹ 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).

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, by intent or through negligence, failed to meet their obligations.²⁰

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²¹ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or

²⁰ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²¹ 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>.

duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Dan McGrath at foia@americanoversight.org or 202.897.4213. Also, if American Oversight's request for expedition is not granted or its 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