



June 3, 2019

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.

On June 18, 2018, President Trump nominated Brian J. Bulatao to be Under Secretary of State for Management, the third most senior position at the State Department.¹ Bulatao, a long-time friend and business associate of Secretary Mike Pompeo's²—who also accompanied him to the Central Intelligence Agency and served there as his Chief Operating Officer—faced a stalled confirmation process of nearly eleven months, reportedly due to State's refusal to cooperate with congressional oversight.³ Bulatao was ultimately confirmed on May 16, 2019.⁴

From June 18, 2018, through May 16, 2019, while awaiting confirmation, Bulatao's responsibilities at State remained unclear. Press reporting from August 2018 suggested that Bulatao was informally in touch with Secretary Pompeo, and quoted a State spokesperson as saying that like all nominees,

¹ See *PN2139 - Nomination of Brian J. Bulatao - Department of State*, CONGRESS, <https://www.congress.gov/nomination/115th-congress/2139> (last visited May 29, 2019).

² Rachel Oswald, *Menendez, Pompeo Feud Over Diplomatic Nominees*, ROLL CALL (Oct. 16, 2018), <https://www.rollcall.com/news/politics/menendez-pompeo-feud-over-diplomatic-nominees>; Nahal Toosi, *Pompeo's Inner Circle Heavy on Business, Military Experience*, POLITICO (Aug. 20, 2018, 6:12 PM), <https://www.politico.com/story/2018/08/20/pompeo-state-inner-circle-789827>.

³ Nick Wadhams & Daniel Flatley, *Menendez Drops Hold on Pompeo Friend for State Department Post*, BLOOMBERG (May 2, 2019, 4:26 PM), <https://www.bloomberg.com/news/articles/2019-05-02/menendez-hold-brian-bulatao>.

⁴ Press Release, *Risch Applauds Bulatao Confirmation*, SEN. FOREIGN RELATIONS COMM., May 16, 2019, <https://www.foreign.senate.gov/press/chair/release/risch-applauds-bulatao-confirmation>.



Bulatao “is availed transition space for consultation as part of the regular confirmation process.”⁵ A *ProPublica* database of political appointees suggests that Bulatao officially started at State on September 2, 2018, in the role of Senior Advisor in the Office of the Counselor.⁶

American Oversight seeks records to shed light on the role or roles Bulatao has served at State Department.

Requested Records

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

1. Copies of any SF-50 forms for Brian Bulatao reflecting any change in position or title, including when he entered or left a position.

American Oversight has no objection to the redaction of home addresses, telephone numbers, or social security numbers from the SF-50s.

2. All calendars or calendar entries for Brian Bulatao, including any calendars maintained on his behalf (e.g., by an administrative assistant) from the date he was assigned transition spaces at State—or June 18, 2018, whichever is earlier—through the date the search is conducted.

American Oversight requests that the calendars be produced in a format that includes all invitees, any notes, and all attachments. American Oversight is amenable to receiving the calendars in the “intermediate” format in which it is currently receiving State calendars in the litigation styled *American Oversight v. U.S. Dep’t of Commerce et al.*, 18-cv-534 (D.D.C.).

Please do not limit your search to Outlook calendars. We request the production of any document—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

3. All email communications (including complete email chains) sent by Brian Bulatao from the date he was assigned transition spaces at State—or June 18, 2018, whichever is earlier—through September 2, 2018.

Please note that though American Oversight has limited its request to emails sent by Mr. Bulatao in an effort to streamline the search and limit the volume of potentially

⁵ Toosi, *supra* note 2.

⁶ *Trump Town: Brian Bulatao*, PROPUBLICA, <https://projects.propublica.org/trump-town/staffers/brian-bulatao> (last visited May 21, 2019).

responsive records to be reviewed, this request includes all complete email chains identified in the search. In other words, for example, any email sent by Mr. Bulatao should be considered responsive, and the complete email chain should be produced, displaying both sent and received messages.

4. All records reflecting costs reimbursed or paid directly by your agency for any reimbursable expenses to Brian Bulatao from the date he was assigned transition spaces at State—or June 18, 2018, whichever is earlier—through the date the search is conducted. Payments or reimbursements include any payments associated with travel (including the travel of any staff or security detail assigned to Mr. Bulatao), long-term housing, the cost of government transportation, individual airfare for government employees and/or their spouses, lodging, meals, per diem payments, rental vehicles, overtime payments, payments made via government-issued charge cards or travel cards, or any other reimbursable expenses.

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.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**

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).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁸

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.**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 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.”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

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 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).

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

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, 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

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)).

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

significant way.¹⁵ Second, the request is primarily and fundamentally for non-commercial purposes.¹⁶

Under the public interest requirement, FOIA requesters must satisfy four factors.¹⁷ 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—namely, the operations and activities of Brian Bulatao on behalf of State, including records that will shed light on his specific role and responsibilities. The records American Oversight seeks involve an influential individual, Mr. Bulatao—a longtime friend and associate of Secretary Pompeo—in official government deliberations and decision-making. 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. As described above, information concerning Mr. Bulatao’s role at State prior to his confirmation as Under Secretary of State for Management has been unclear,¹⁸ and so the requested records will provide the public with new information on this subject. 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, staffing choices, and the influence of charter schools and for-profit colleges on the Education Department.¹⁹ The *New York Times* and CNN relied on American Oversight’s analyses to report on Secretary DeVos’s priorities within the Department of Education.²⁰

¹⁵ 22 C.F.R. § 171.16(a)(1).

¹⁶ 22 C.F.R. § 171.16(a)(2).

¹⁷ *D.C. Technical Assistance Org. Inc. v. U.S. Dep’t of Hous. and Urban Dev. (D.C. Technical Assistance)*, 85 F.Supp.2d 46, 48–49 (D.D.C. 2000) (requested documents will contribute to “greater understanding of government activities”).

¹⁸ See Toosi, *supra* note 2.

¹⁹ See *Influence & Access at the Department of Education*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/investigation/influence-access-at-the-department-of-education>; *Unexcused Absences: DeVos Calendars Show Frequent Days Off*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/unexcused-absences-devos>.

²⁰ Eric Lipton, *Betsy DeVos’s School Schedule Shows Focus on Religious and Nontraditional Schools*, N.Y. TIMES, Oct. 27, 2017, <https://www.nytimes.com/2017/10/27/us/politics/betsy-devos-work-schedule-education.html>; Gregory Wallace et al., *What Betsy DeVos’s Schedule Tells Us About Her Agenda*, CNN (Oct. 29, 2017, 12:22 PM), <http://www.cnn.com/2017/10/28/politics/devos-schedules-education/index.html>.

American Oversight's request is also primarily and fundamentally for non-commercial purposes.²¹ 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 our public website and promotes their availability on social media platforms, such as Facebook and Twitter.²² 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 website²³ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁴ 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.²⁵

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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. Also, if American Oversight's

²¹ 22 C.F.R. § 171.16(a)(2)(i)-(iii).

²² 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 30, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 30, 2019).

²³ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁴ *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>.

²⁵ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 'MS', is centered on the page.

Melanie Sloan
Senior Advisor
American Oversight