



July 9, 2019

VIA ONLINE PORTAL

Michael Toland, Ph.D.  
Departmental FOIA Officer  
U.S. Department of Commerce  
Office of Privacy and Open Government  
14th and Constitution Avenue NW  
Mail Stop 52010FB  
Washington, DC 20230  
Via FOIAOnline

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, American Oversight makes the following request for records.

In March 2018, Commerce Secretary Wilbur Ross approved the addition of a question about citizenship to the 2020 census, raising concerns that adding such a question could suppress response to the census and interfere with the accuracy of its results.<sup>1</sup> During the past year of debate about the citizenship question, new information has come to light regarding the involvement of outside political actors and advisors in advocating for the addition of the citizenship question.

Most recently, in May 2019, files of now-deceased Republican consultant and gerrymandering strategist Thomas B. Hofeller showed that his justification language regarding the citizenship question was later used in Department of Justice documents,<sup>2</sup> and Republican National Committee filings show that the Republican party paid Hofeller more than \$400,000 between the time of President Trump's inauguration through July

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<sup>1</sup> Brendan O'Brien, *U.S. to Add Citizenship Question in 2020 Census: Commerce Dept*, REUTERS, Mar. 26, 2018, <https://www.reuters.com/article/us-usa-census/u-s-to-add-citizenship-question-in-2020-census-commerce-dept-idUSKBN1H308B>.

<sup>2</sup> Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES, May 30, 2019, <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.



2018.<sup>3</sup> Furthermore, newly-released emails indicate that a senior Census Bureau official discussed the citizenship question with Hofeller in 2015.<sup>4</sup>

A. Mark Neuman—a long-time friend of Hofeller’s and a presidential transition team member involved in census planning—also reportedly advised the administration, and specifically Secretary Ross, on census issues. For example, a May 2017 email released through litigation from then-Chief of Staff Wendy Teramoto to Secretary Ross reads, “I continue to talk frequently with Marc Neumann [sic] and we often have dinner together. He will not leave les [sic] but is in love with the census and talks about it nonstop.”<sup>5</sup>

American Oversight seeks records to shed light on whether and to what extent outside partisan consultants influenced decision-making of senior Trump administration officials.

### **Requested Records**

American Oversight requests that the Department of Commerce (Commerce) produce the following records within twenty business days:

All communications (including email messages, email attachments, calendar invitations, and faxes) between (1) the Commerce employees and officials specified below<sup>6</sup> and, (2) Thomas “Tom” Hofeller (including *but not limited to* the email addresses [celticheal@aol.com](mailto:celticheal@aol.com) and [thofeller@rnchq.org](mailto:thofeller@rnchq.org)) or A. Mark Neuman.

- i. Secretary Wilbur Ross
- ii. Former Chief of Staff, Wendy Teramoto
- iii. Chief of Staff, Michael Walsh, Jr.
- iv. Deputy Secretary, Karen Dunn Kelley
- v. General Counsel, Peter Davidson
- vi. Former Senior Counselor and Advisor, James Uthmeier

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<sup>3</sup> Russ Choma, *GOP Paid Millions to Gerrymandering Expert Behind Census Citizenship Question*, MOTHER JONES, June 5, 2019, <https://www.motherjones.com/politics/2019/06/gop-paid-millions-to-gerrymandering-expert-behind-census-citizenship-question/>.

<sup>4</sup> Hansi Lo Wang, *Emails Connect Census Official With GOP Strategist on Citizenship Question*, NPR (June 15, 2019, 4:16 AM), <https://www.npr.org/2019/06/15/732669380/emails-connect-census-official-with-gop-strategist-on-citizenship-question>.

<sup>5</sup> Hansi Lo Wang, *Trump Blocked Congress From Seeing These Emails About the Census Unredacted*, NPR (June 14, 2019, 2:06 PM), <https://www.npr.org/2019/06/14/732599732/trump-blocked-congress-from-seeing-these-emails-about-the-census-unredacted>.

<sup>6</sup> In an effort to accommodate your agency, American Oversight has attempted to identify the most current positions for specified custodians based on public reporting. However, American Oversight still requests that records from specified custodians in prior positions—or current positions with other titles besides those listed here—still be produced.

- vii. Deputy Chief of Staff, Earl Comstock
- viii. Former Deputy Chief of Staff, Israel Hernandez
- ix. White House Advisor, Eric Branstad
- x. Former Deputy Director of the Office of White House Liaison, Kevin Quinley
- xi. Senior Policy Advisor, Sahra Park-Su
- xii. Director of Intergovernmental Affairs, Aaron Willard

Please provide all responsive records from January 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."<sup>7</sup> The public has a significant interest in understanding the degree and nature of involvement by partisan gerrymandering strategists in crafting questions with the potential to skew results of the 2020 census. Collecting accurate census data is foundational to our democracy, including redistricting efforts and federal aid programs, and efforts by a select group of partisan interests to add a question that may suppress an accurate response will affect every American.<sup>8</sup> Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including whether and to what extent outside political actors have exercised influence within the Trump administration with respect to the 2020 Census. 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.

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>8</sup> *Getting Counted: The Importance of the Census to State and Local Communities*, Comm. On Oversight & Gov't Reform, Subcomm. On Civil Rights and Civil Liberties, U.S. House of Representatives (May 2019), <https://oversight.house.gov/legislation/hearings/getting-counted-the-importance-of-the-census-to-state-and-local-communities>;

Ari Berman, *Hidden Figures: How Donald Trump Is Rigging the Census*, MOTHER JONES, May/June 2018 Issue, <https://www.motherjones.com/politics/2018/03/donald-trump-rigging-2020-census-undercounting-minorities-1/>.

This request is primarily and fundamentally for non-commercial purposes.<sup>9</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>10</sup>

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.<sup>11</sup> 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;<sup>12</sup> 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;<sup>13</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>14</sup> posting records and analysis relating to the

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<sup>9</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>10</sup> 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 17, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 17, 2019).

<sup>11</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>12</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>; *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>13</sup> 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>.

<sup>14</sup> *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>.

federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>15</sup> 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 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.<sup>16</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Guidance Regarding the Search & Processing of Requested Records**

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:

- 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.<sup>17</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, by intent or through negligence, failed to meet their obligations.<sup>18</sup>
- 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

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<sup>15</sup> *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>.

<sup>16</sup> *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

<sup>17</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>18</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).

requirements to manage agency information electronically,<sup>19</sup> 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 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

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<sup>19</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>.

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](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,

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