



September 17, 2019

VIA ONLINE PORTAL

David M. Hardy
Chief, Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
170 Marcel Drive
Winchester, VA 22602-4843
Via Online Portal

Re: Expedited Freedom of Information Act Request

Dear Mr. Hardy:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Federal Bureau of Investigation (FBI), 28 C.F.R. Part 16, American Oversight makes the following request for records.

Recent public reports indicate that the supplemental investigation into now-Supreme Court Justice Brett Kavanaugh's alleged sexual misconduct—which took place from roughly September 28, 2018 to October 6, 2018—only included interviews with nine potential witnesses.¹ Recent reporting also has shed light on an allegation of sexual misconduct that was raised to the FBI before Justice Kavanaugh's confirmation, but that was not made public before Justice Kavanaugh's confirmation vote.² Numerous members of Congress have called for Justice Kavanaugh's impeachment based on this newly reported allegation regarding and recent reporting about the limits that the White House and Senate Republicans placed on the FBI's supplemental background investigation.³

¹ Jackie Calmes, *New Reporting Details How FBI Limited Investigation of Kavanaugh Allegations*, L.A. TIMES (Sept. 16, 2019, 4:00 AM), <https://www.latimes.com/politics/story/2019-09-16/fbi-investigation-brett-kavanaugh-confirmation>.

² Robin Pogrebin & Kate Kelly, *Brett Kavanaugh Fit In With the Privileged Kids. She Did Not.*, N.Y. TIMES, Sept. 14, 2019, <https://www.nytimes.com/2019/09/14/sunday-review/brett-kavanaugh-deborah-ramirez-yale.html>.

³ See Sandra E. Garcia, *Calls for Kavanaugh's Impeachment Come Amid New Misconduct Allegations*, N.Y. TIMES (Sept. 16, 2019, 2:23 PM), <https://www.nytimes.com/2019/09/15/us/brett-kavanaugh-allegations-trump-impeach.html>.



Requested Records

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

All FBI form 302s reflecting the content of all interviews conducted as a part of the FBI's supplemental background investigation of now-Justice Brett Kavanaugh, which was reportedly conducted between roughly September 28, 2018, and October 6, 2018.

As only nine witnesses were reportedly contacted during this supplemental investigation, American Oversight expects that the records requested here are readily identifiable and the search for these records will not be burdensome.

Please provide all responsive records from September 28, 2018, through January 1, 2019.

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."⁴ The public has a significant interest in FBI's investigation of potential serious sexual misconduct committed by a nominee to serve on the Supreme Court. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including whether FBI conducted a thorough supplemental background investigation of allegations against a nominee to serve on the Supreme Court. The requested records also have the potential to shed light on whether a Supreme Court Justice committed serious acts of sexual assault and misconduct. 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.

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

This request is primarily and fundamentally for non-commercial purposes.⁵ 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.⁶

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.⁷ 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;⁸ 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;⁹ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁰ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹¹ posting records and

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ American Oversight currently has approximately 12,300 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 16, 2019).

⁷ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁸ 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>.

⁹ 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>.

¹⁰ *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>.

¹¹ Calmes, *supra* note 1; Pobegrin & Kelly, *supra* note 2; Garcia, *supra* note 3; Philip Bump, *Kavanaugh's Confirmation Hinged on an FBI Investigation that Increasingly Looks Incomplete*,

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.¹²

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(e)(1)(iv), 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 there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence.

There is widespread and exceptional media interest in understanding the conduct of and facts gathered by FBI's supplemental background investigation of then-Supreme Court nominee Brett Kavanaugh.¹³ The subject matter of this request also concerns possible questions concerning the government's integrity. In particular, the subject matter of this request regards two questions related to the government's integrity that affect public confidence. First, there are substantial public concerns that the FBI's background

WASH. POST (Sept. 16, 2019, 10:26 AM), <https://beta.washingtonpost.com/politics/2019/09/16/kavanaughs-confirmation-hinged-an-fbi-investigation-that-increasingly-looks-incomplete/>; Michelle Ruiz, *The New Brett Kavanaugh Revelations Prove the Original FBI Investigation Was a Sham*, VOGUE (Sept. 16, 2019, 12:36 PM), <https://www.vogue.com/article/education-of-brett-kavanaugh-new-allegations-impeachment>; Tom Scocca, *New Reporting Claims Brett Kavanaugh Did Touch Classmates With His Penis—Twice*, SLATE (Sept. 14, 2019, 11:50 PM), <https://slate.com/news-and-politics/2019/09/brett-kavanaugh-sexual-misconduct-new-york-times.html>.

¹² *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹³ See, e.g., Protess et al., *supra* note 1; Mustian, *supra* note 2; William K. Rashbaum & Ben Protess, *New Charges in Stormy Daniels Hush Money Inquiry Unlikely, Prosecutors Signal*, N.Y. TIMES, July 18, 2019, <https://www.nytimes.com/2019/07/18/nyregion/stormy-daniels-michael-cohen-documents.html>; Rebecca Balhaus, *Prosecutors Are Asked Why Trump Wasn't Indicted for Campaign Violations*, WALL ST. J. (July 19, 2019, 4:18 PM), <https://www.wsj.com/articles/prosecutors-asked-why-trump-wasnt-indicted-for-campaign-finance-violations-11563561750>; Matt Zapposky, *Prosecutors Have 'Concluded' Michael Cohen Campaign Finance Probe, Judge Says*, WASH. POST, July 17, 2019, https://www.washingtonpost.com/national-security/prosecutors-have-concluded-michael-cohen-campaign-finance-probe-judge-says/2019/07/17/733391a0-a8b1-11e9-9214-246e594de5d5_story.html?utm_term=.df3f81727e82.

investigation into allegations of sexual misconduct by then-Supreme Court nominee Brett Kavanaugh was unduly limited to a small number of witnesses regardless of the investigation's findings or witness accounts provided to the FBI.¹⁴ Second, there are substantial public concerns about the character and honesty of now-Supreme Court Justice Kavanaugh in light of the allegations of sexual misconduct against him and concerns that he did not testify truthfully in his confirmation hearing.¹⁵ The U.S. House of Representatives Committee on Oversight and Reform has expressed similar concerns. In particular, the Committee has asked whether DOJ failed to pursue criminal charges due to an opinion that the president cannot be prosecuted while in office, and the Committee further requested documents underlying the investigation.¹⁶

Moreover, I certify to be true and correct to the best of my knowledge and belief that there exist possible questions concerning the government's integrity regarding the conduct of the investigation into the president's potential criminal activity, and the decision to conclude the investigation without filing charges.

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,¹⁷ 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."¹⁸ 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.¹⁹ As discussed previously, American

¹⁴ See Calmes, *supra* note 1; Bump, *supra* note 11.

¹⁵ See Garcia, *supra* note 3, Scocca, *supra* note 11.

¹⁶ Kyle Cheney, *Dems Ask Whether DOJ Memo Prevented Prosecuting Trump for Hush Payments*, Politico (July 19, 2019, 2:49 PM), <https://www.politico.com/story/2019/07/19/doj-memo-trump-hush-payments-1422933>; Ltr. from Rep. Elijah Cummings, Chairman, U.S. House of Representatives, Comm. on Oversight and Reform, to Audrey Strauss, Deputy United State Attorney, Southern District of New York, July 19, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-19.COR%20to%20Strauss-SDNY%20re%20Hush%20Money%20Investigation.pdf>.

¹⁷ 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).

¹⁸ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁹ American Oversight currently has approximately 12,300 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 16, 2019).

Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁰

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

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:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- 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

²⁰ 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-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>.

Records Act and FOIA.²¹ 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.²²

- 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,²³ 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.

²¹ 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).

²² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²³ 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>.

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 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