



September 30, 2019

VIA EMAIL

Jill Eggleston
FOIA Officer/Public Liaison
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010
uscis.foia@uscis.dhs.gov

Re: Expedited Freedom of Information Act Request

Dear Ms. Eggleston:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 6 C.F.R. Part 5, American Oversight makes the following expedited request for records.

Requested Records

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

All text messages sent by USCIS Acting Director Ken Cuccinelli on his official government phone or phones, or any other mobile device on which he conducts official business.

In an effort to accommodate your agency and reduce the number of potentially responsive records, American Oversight agrees that the search for responsive communications may be limited to messages sent by Acting Director Cuccinelli. Despite this search accommodation, American Oversight still requests that complete message chains be produced, displaying both sent and received messages.

Please provide all responsive records from June 10, 2019, 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."¹ President Trump appointed Mr. Cuccinelli as acting director of USCIS in June 2019.² Since that time, Acting Director Cuccinelli has made substantial and controversial changes to USCIS policies and operations, including asking USCIS staffers to volunteer to help U.S. Immigration and Customs Enforcement (ICE) implement a new program that keeps asylum-seekers in Mexico,³ and introducing a new rule that would allow the Trump administration to deny permanent residency to immigrants who use or are likely to use welfare benefits.⁴ Acting Director Cuccinelli has additionally signaled that the public should expect further significant changes to USCIS policies and operations.⁵ The public deserves clear insight into the text message conversations in which such an influential figure is participating. 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.

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² See Julia Ainsley & Jonathan Allen, *Trump Taps Conservative Ken Cuccinelli to Head Citizenship Agency*, NBC NEWS (June 10, 2019, 1:11 PM), <https://www.nbcnews.com/politics/immigration/trump-taps-conservative-ken-cuccinelli-head-citizenship-agency-n1015801>.

³ Hamed Aleaziz, *Civil Servants Who Process Immigration Applications Are Being Asked to Help ICE Instead*, BUZZFEED NEWS (July 17, 2019, 2:30 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-immigration-applications-backlog-ice>.

⁴ Hamed Aleaziz, *A New Trump Policy Could Deny Green Cards to Immigrants Who Use Public Benefits*, BUZZFEED NEWS (Aug. 12, 2019, 8:54 AM), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-policy-green-cards-food-stamps>.

⁵ Ken Cuccinelli (@USCISCuccinelli), TWITTER (Aug 14, 2019, 3:39 PM), <https://twitter.com/USCISCuccinelli/status/1161723956077957120>.

This request is primarily and fundamentally for non-commercial purposes.⁶ 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.⁷

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.⁸ 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;⁹ 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;¹⁰ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹¹ posting records and analysis relating to the federal

⁶ *See id.*

⁷ American Oversight currently has approximately 12,300 page likes on Facebook and 54,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 30, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 30, 2019).

⁸ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁹ *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>.

¹⁰ *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>.

¹¹ *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>.

government's efforts to sell nuclear technology to Saudi Arabia;¹² 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.¹³

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 6 C.F.R. § 5.5(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. President Trump appointed Mr. Cuccinelli as acting director of USCIS in June 2019.¹⁴ Since that time, Acting Director Cuccinelli has made substantial and controversial changes to USCIS policies and operations, including asking USCIS staffers to volunteer to help U.S. Immigration and Customs Enforcement (ICE) implement a new program that keeps asylum-seekers in Mexico,¹⁵ and introducing a new rule that will allow the Trump administration to deny permanent residency to immigrants who use or are likely to use welfare benefits.¹⁶ Acting Director Cuccinelli has additionally signaled that the public should expect further significant changes to USCIS policies and operations.¹⁷ However, there is still much that the American public does not know about how Acting Director Cuccinelli has changed USCIS. The records that American Oversight seeks go directly to whether and to what extent Mr. Cuccinelli is faithfully undertaking his duties as Acting Director, and whether and to what extent any outside influences are allowed undue access and input on federal policies.

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 the Acting Director's decisions as the head of USCIS. Questions linger over the propriety of Mr. Cuccinelli's appointment pursuant to

¹² *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>.

¹³ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁴ See Ainsley, *supra* note 2.

¹⁵ See Aleaziz, *supra* note 3.

¹⁶ See Aleaziz, *supra* note 4.

¹⁷ See Cuccinelli, *supra* note 5.

the Federal Vacancies Reform Act,¹⁸ and any high-level decisions with regard to USCIS leadership that he has made following his appointment are critical context for informing the public discussion on that topic. Moreover, the Trump administration’s immigration policy is a matter of significant public debate,¹⁹ and ensuring that citizens are able to participate in a public debate in an informed manner was one of Congress’s central purposes in enacting FOIA. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”). It is imperative that the public have access to the records that American Oversight seeks so that discussion around the nation’s immigration policy and operations, especially as they concern USCIS, may proceed on a fully-informed basis.

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,²⁰ 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.”²¹ 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.²² As discussed previously, American

¹⁸ *See, e.g.*, Alexandra Villarreal, *USCIS Head Cuccinelli Unlawfully Appointed by Trump*, *Lawsuit Says*, NBC MIAMI (Sept. 6, 2019, 11:36 AM),

<https://www.nbcmiami.com/news/politics/USCIS-Head-Cuccinelli-Unlawfully-Appointed-by-Trump-Lawsuit-559568251.html>; Bridget Johnson, *House Chairmen Question Whether Cuccinelli Appointment Was Lawful Under Vacancies Act*, *HOMELAND SEC. TODAY*, June 19, 2019, <https://www.hstoday.us/federal-pages/dhs/uscis-dhs-federal-pages/house-chairmen-question-whether-cuccinelli-appointment-was-lawful-under-vacancies-act/>.

¹⁹ *See, e.g.*, Michael D. Shear et al., *Trump’s Policy Could Alter the Face of the American Immigrant*, *N.Y. TIMES*, Aug. 14, 2019, <https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html>.

²⁰ *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).

²¹ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²² American Oversight currently has approximately 12,300 page likes on Facebook and 54,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Sept. 30, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 30, 2019).

Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²³

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

²³ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *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>; *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.²⁴ 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.²⁵

- 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,²⁶ 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.

²⁴ 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).

²⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁶ 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 Hart Wood at foia@americanoversight.org or 202.873.1743. 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