



October 2, 2019

VIA EMAIL

FOIA Requester Service Center
U.S. Department of Energy
1000 Independence Avenue SW
Mail Stop MA-46
Washington, DC 20585
foia-central@hq.doe.gov

Re: Expedited 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, 10 C.F.R. Part 1004, American Oversight makes the following request for records.

On May 9, 2019, President Trump's personal lawyer, Rudolph Giuliani, announced that he would travel to Ukraine to meet with the country's president-elect to urge the Ukrainian government to pursue an investigation related to the son of former Vice President Biden—a potential electoral opponent of the president.¹ After facing widespread criticism for this effort to influence a foreign government's law enforcement efforts for political gain, Mr. Giuliani canceled his trip to Ukraine.²

A now-released whistleblower complaint indicates that these efforts continued, however, as the administration acted to withhold vital aid to Ukraine days before President Trump's July 25 phone call with Ukraine's President Zelensky.³ Further, the whistleblower stated:

¹ Kenneth P. Vogel, *Rudy Giuliani Plans Ukraine Trip to Push for Inquiries That Could Help Trump*, N.Y. TIMES, May 9, 2019, <https://www.nytimes.com/2019/05/09/us/politics/giuliani-ukraine-trump.html>.

² Kenneth P. Vogel, *Rudy Giuliani Cancels His Trip to Ukraine, Blaming Democrats' 'Spin,'* N.Y. TIMES, May 11, 2019, <https://www.nytimes.com/2019/05/11/us/politics/rudy-giuliani-ukraine.html>.

³ Letter to Chairs Sen. Richard Burr & Rep. Adam Schiff, U.S. Senate Select Committee on Intelligence & U.S. House of Representatives Permanent Select Committee on Intelligence, Aug. 12, 2019, https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf ("Whistleblower Complaint").



I learned from U.S. officials that, on or around 14 May, the President instructed Vice President Pence to cancel his planned travel to Ukraine to attend President Zelenskyy's inauguration on 20 May; Secretary of Energy Rick Perry led the delegation instead. According to these officials, it was also "made clear" to them that the President did not want to meet with Mr. Zelenskyy until he saw how Zelenskyy "chose to act" in office. I do not know how this guidance was communicated, or by whom.⁴

American Oversight seeks records with the potential to shed light on whether and to what extent the political interests of the president have influenced the administration's policies and actions in Ukraine, including whether and to what extent Secretary Perry, including through Chief of Staff Brian McCormack, took any actions to persuade the Ukrainian government to conduct an investigation connected to a potential political opponent of the president.

Requested Records

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

1. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (1) Secretary Rick Perry, Chief of Staff Brian McCormack, or anyone else who traveled on DOE's delegation to the Ukraine in May 2019 and (2) Rudolph Giuliani, Sam Kislin, Victoria Toensing, or Joseph diGenova.
2. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of Secretary Rick Perry or Chief of Staff Brian McCormack (1) any plan by Rudolph Giuliani, Sam Kislin, Victoria Toensing, and/or Joseph diGenova to travel to Ukraine or to communicate with

⁴ *Id.* at App. 1-2; see also Adragna & Lefebvre, *Democrats Turn Eye to Rick Perry in Ukraine Probe*, POLITICO (10/1/2019, 5:00 PM), <https://www.politico.com/news/2019/10/01/menendez-perry-ukraine-016229>.

Ukrainian government officials or future Ukrainian government officials and/or (2) any other effort to encourage the Ukrainian government to investigate any matter related to former Vice President Joseph Biden or his son Hunter Biden.

Please provide all responsive records from January 1, 2019, through the date the search is conducted.

Please exclude news clips or mass mailer generated from non-governmental services and emails distributed to a wide listserv of twenty or more email addresses. However, a news clips or mass mailer email that is forwarded to or from Chief of Staff McCormack with any additional message should be considered responsive.

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."⁵ The subject matter of the requested records specifically relates to the operations or activities of the government, including communications surrounding an alleged effort by the Trump administration to persuade the Ukrainian government to investigate a family member of one of the president's potential political opponents.⁶ There is significant public interest in understanding whether and to what extent the perceived political interests of the president are influencing U.S. foreign policy toward Ukraine, including whether the U.S. delegation led by Secretary Perry was involved in the alleged efforts to lobby Ukrainian officials,⁷ or whether other U.S. Government actions are being undertaken to pressure a foreign government to investigate the president's political opponent for President Trump's electoral advantage. 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.

⁵ 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ See Vogel *supra* note 1; Vogel *supra* note 2.

⁷ See Whistleblower Complaint *supra* note 3.

This request is primarily and fundamentally for non-commercial purposes.⁸ 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.⁹

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.¹⁰ 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;¹¹ 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;¹² posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹³ posting records and analysis relating to the

⁸ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ 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. 26, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 26, 2019).

¹⁰ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹¹ 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>.

¹² 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>.

¹³ *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-busines3/ks>.

federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁴ and 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.¹⁵

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and the implementing regulations of your agency, 10 C.F.R. § 1004.5(d)(6), 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 a compelling need for expedited processing of the above request because the information requested is urgently needed in order to inform the public concerning actual or alleged government activity, and American Oversight is primarily engaged in disseminating the information it received from public records requests to the public.

The allegations laid out in the whistleblower complaint and related reporting are of the utmost public urgency and underlie the announced impeachment inquiry into the president's actions.¹⁶ There is clearly an urgent need to inform the public regarding the matters that are the subject of American Oversight's FOIA request. First, American Oversight has requested records with the potential to shed light on whether the current administration has, allegedly at the behest of President Trump, undertaken inappropriate

¹⁴ *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>.

¹⁵ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁶ See Whistleblower Complaint, *supra* note 3; see also Zachary B. Wolf & Curt Merrill, *The Whistleblower Complaint, Annotated*, CNN, Sept. 26, 2019, <https://www.cnn.com/interactive/2019/09/politics/whistleblower-complaint-annotated/>; Olivia Beavers & Morgan Chalfant, *Whistleblower Complaint Says Trump Sought to Enlist Ukraine's Help in 2020*, THE HILL (Sept. 26, 2019, 8:42 AM), <https://thehill.com/policy/national-security/463151-intelligence-panel-released-declassified-whistleblower-document>; Kyle Cheney, *Whistleblower Says White House Tried to 'Lock Down' Ukraine Call*, POLITICO, Sept. 26, 2019, 12:13 PM), <https://www.politico.com/story/2019/09/26/congress-releases-whistleblower-complaint-alleging-trump-abused-his-office-1514008>; Nancy Pelosi Announces Formal Trump Impeachment Inquiry, AXIOS, Sept. 24, 2019, <https://www.axios.com/nancy-pelosi-announces-impeachment-inquiry-4396ba96-6586-48e1-9aae-083f279db57d.html>.

actions to pressure a foreign government to conduct an investigation of one of the president's potential political opponents in order to give the president an electoral advantage. Because voting in the presidential primary elections—in which both President Trump and candidate Joe Biden will be candidates—is scheduled to commence in less than five months, on February 3, 2020, and voting in the general election will start in just over a year, there is plainly an urgent need to inform the public about the administration actions that would be revealed by the records requested here.¹⁷ Second, recent factual developments have demonstrated that there are immense public concerns that the president and his administration may be continuing or intensifying their efforts to use the authority and resources of the federal government to pressure the Ukrainian government to undertake an investigation of presidential candidate Joe Biden and his family.¹⁸ Secretary Perry's involvement in those efforts is the subject of congressional scrutiny and great public interest,¹⁹ and records held by the Chief of Staff have the potential to shed light on this critical issue.

American Oversight's request seeks information that can shed light on whether and to what extent the Trump administration is attempting to use government resources to pressure a foreign nation to undertake actions designed to threaten, weaken, or otherwise target the president's political opponent for the purpose of giving him an electoral advantage. The public urgently needs the information American Oversight has requested before voting in the 2020 presidential election, including before voting in the primaries of that election. The public has a right to know if the president's administration has inappropriately used government power to gain electoral advantage against an opponent through pressure on a foreign nation, including potentially through the U.S. delegation led by Secretary Perry.

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

¹⁷ Catherine Kim, *The 2020 Election Calendar*, VOX (Sept. 12, 2019, 11:56 PM), <https://www.vox.com/2019/6/26/18693259/2020-presidential-election-calendar-primaries>.

¹⁸ See Whistleblower Complaint, *supra* note 3; see also *supra* note 17; Robert Legare, *Rudy Giuliani Says He Didn't Ask Ukraine to Investigate Biden—And Then Says He Did*, CBS NEWS (Sept. 20, 2019, 10:31 AM) <https://www.cbsnews.com/news/rudy-giuliani-chris-cuomo-interview-did-not-ask-ukraine-to-investigate-biden-and-then-says-he-did-cnn-appearance/>.

¹⁹ See Adragna & Lefebvre, *supra* note 4.

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).

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 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. 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),

²² 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. 20, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 20, 2019).

²³ 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>.

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.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

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>.

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 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 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