



January 7, 2020

VIA EMAIL

U.S. Department of Defense
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

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, American Oversight makes the following request for records.

On January 2, 2020, the United States carried out a military strike in Iraq that killed Qasem Soleimani, commander of the Iranian Islamic Revolutionary Guard Corps Quds Force.¹ The targeting of one of Iran's most senior officials immediately ratcheted up tensions with Iran, and subsequent U.S. actions—such as President Trump's threats to target Iranian cultural sites—suggest no efforts to deescalate.²

American Oversight seeks records with the potential to shed light on the administration's extraordinarily weighty decisions regarding military action against Iran.

¹ Mustafa Salim et al., *In Major Escalation, American Strike Kills Top Iranian Commander in Baghdad*, WASH. POST (Jan. 3, 2020, 3:02 AM), https://www.washingtonpost.com/world/national-security/defense-secretary-says-iran-and-its-proxies-may-be-planning-fresh-attacks-on-us-personnel-in-iraq/2020/01/02/53b63f00-2d89-11ea-bcb3-ac6482c4a92f_story.html.

² Seung Min Kim & Philip Rucker, *Trump Threatens to Strike Iranian Cultural Sites and Impose 'Very Big' Sanctions on Iraq as Tensions Rise*, WASH. POST (Jan. 5, 2020, 10:47 PM), https://www.washingtonpost.com/politics/trumps-threats-against-iranian-sites-raise-questions-about-the-potential-for-war-crimes/2020/01/05/c03d8de8-2ff2-11ea-898f-eb846b7e9feb_story.html.



Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that your agency produce the following records within twenty business days:

All unclassified emails (including email messages, email attachments, calendar invitations, and complete email chains) sent by the officials specified below to any non-governmental email address (including any emails ending in .com, .org, .mail, .edu, .net).

- i. Secretary of Defense Mark Esper
- ii. Chief of Staff Eric Chewning
- iii. Deputy Secretary David Norquist
- iv. Chairman of the Joint Chiefs of Staff Army Gen. Mark Milley
- v. Anyone serving in the capacity of White House Liaison or Advisor
- vi. General Counsel Paul Ney Jr.
- vii. Assistant Secretary of Defense for Legislative Affairs Robert Hood
- viii. Under Secretary of Defense for Policy John Rood
- ix. CENTCOM Commander General Kenneth McKenzie Jr.
- x. Anyone serving as the Deputy Assistant Secretary of Defense for the Middle East, including in an acting capacity

Please provide all responsive records between December 27, 2019, and January 7, 2020.

American Oversight has limited its request to sent messages of each official to reduce the volume of potentially responsive records. American Oversight still requests complete email chains. So, for example, if a specified official sent a response to an incoming message, the email chain containing the initially received message and the response is responsive to this request.

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.”³ In particular, the requested records have the potential to shed light on the administration’s military action against Iran, a matter of extraordinary public concern that has significantly raised the prospect of direct military conflict.⁴ The requested records have the potential to shed light on who the administration has communicated with regarding military action, as well as the legal analysis and congressional engagement it has undertaken to justify its decisions. 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.

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

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ Salim et al., *supra* note 1.

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ American Oversight currently has approximately 14,730 page likes on Facebook and 86,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 5, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 5, 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>.

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 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.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 the implementing regulations of your agency, 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 receives from public records requests to the public.

Recent reporting demonstrates that 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 President Trump's decision to escalate tensions with Iran, including via a military strike on Iranian Quds Force commander Qasem Soleimani. Public reporting suggests that government decisionmakers sidelined normal processes, such as requesting congressional authorization for action that could lead directly to military conflict or notifying senior

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 *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>.

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

Congressional leadership in advance of the strike.¹³ Furthermore, reporting suggests that the administration did not secure Pentagon stakeholders' involvement and buy-in—and that the evidence used to justify the attack did not in fact indicate a significant change in Soleimani's activities.¹⁴

Second, there is widespread public concern that the current administration has, potentially at the behest of President Trump, undertaken military action in order to distract from his impeachment proceedings and give the president an electoral advantage. There is plainly an urgent need to inform the public about these matters before irreversible decisions are made to engage the United States in a wide-ranging military conflict. Without the dissemination of such information to the public, citizens will not be afforded the opportunity to petition their elected representatives in an informed manner about matters of extraordinary importance.

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,¹⁵ 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.”¹⁶ 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.¹⁷ As discussed previously, American

¹³ Maggie Haberman & Catie Edmondson, *White House Notifies Congress of Suleimani Strike Under War Powers Act*, N.Y. TIMES (Jan. 6, 2020, 12:50 PM),

<https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html>; Manu Raju & Ted Barrett, *Top Democratic Leaders Kept in Dark About Soleimani Attack*, CNN POLITICS (Jan. 3, 2020, 2:46 PM), <https://www.cnn.com/2020/01/03/politics/congress-soleimani-attack/index.html>.

¹⁴ Helene Cooper et al., *As Tensions With Iran Escalated, Trump Opted for Most Extreme Measure*, N.Y. TIMES (Jan. 6, 2020, 2:22 AM),

<https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html>.

¹⁵ 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).

¹⁶ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁷ American Oversight currently has approximately 14,700 page likes on Facebook and 86,7000 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight>

(last visited Dec. 5, 2019); American Oversight (@weareoversight), TWITTER,

<https://twitter.com/weareoversight> (last visited Dec. 5, 2019).

Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁸

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), 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

¹⁸ 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>.

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.¹⁹ 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.²⁰
- 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,²¹ 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.

¹⁹ 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).

²⁰ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²¹ 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>.

- 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 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,



Melanie Sloan
Senior Advisor
American Oversight