



February 3, 2020

VIA ELECTRONIC MAIL

Hirsh D. Kravitz,
Freedom of Information/Privacy Act Office
Civil Division
U.S. Department of Justice
1100 L Street, NW, Room 8314
Washington, DC 20035
civil.routing.foia@usdoj.gov

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.

Public reporting has long raised concerns that the Trump administration has employed inappropriate non-disclosure agreements (NDAs) to restrict the ability of government officials from sharing unclassified information about their government service. On March 18, 2018, the *Washington Post* reported that, in the early months of the Trump administration, senior White House staff were pressed into signing NDAs of expansive scope.¹ A draft of one of these proposed NDAs reportedly extended the prohibition on disclosing nonpublic information indefinitely beyond the end of the Trump presidency and imposed an astounding \$10 million penalty for violation of the agreement.² The draft agreement also apparently allowed Donald Trump to enforce the agreement in his personal

¹ Ruth Marcus, *Trump Had Senior Staff Sign Nondisclosure Agreements. They're Supposed to Last Beyond His Presidency.*, WASH. POST (Mar. 18, 2018, 3:56 PM), https://www.washingtonpost.com/amphtml/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79d-f3d931db7f68_story.html?tid=ss_tw-amp&_twitter_impression=true.

² *Id.*



capacity.³ Such sweeping NDA restrictions appear to be unprecedented,⁴ and could constitute an unconstitutional restriction on officials' First Amendment rights.⁵

More recently, the Department of Justice (DOJ) Civil Division has demanded that the publishers of a book by a (current or former) senior administration official provide the identity of and NDAs signed by that official or assurances that they had not signed any NDAs in connection with their government service.⁶ The Civil Division's letter suggests that administration officials have "routinely" signed NDAs beyond the standard government NDAs required to access classified national security information.⁷

American Oversight seeks records with the potential to shed light on whether the Trump administration has employed NDAs in an inappropriate manner.

Requested Records

American Oversight requests that DOJ produce the following records within twenty business days:

All non-disclosure agreements (or copies of such agreements)⁸ in the Civil Division's possession that restrict the ability of current or former government officials to disclose information obtained through government service, other than standardized non-disclosure agreements concerning access to national security information classified pursuant to presidential executive order.

Please provide all responsive records from January 20, 2017, through the date of the search.

The Civil Division's recent letter to a book publisher requesting an anonymous administration official's non-disclosure agreements and information about the

³ *Id.*

⁴ Ted Hesson, *Could NDA Follow Trump to White House?*, POLITICO (Oct. 18, 2016, 10:00 AM), <https://www.politico.com/tipsheets/morning-shift/2016/10/could-nda-follow-trump-to-white-house-today-in-wikileaks-osha-sends-final-rule-clarifying-recordkeeping-to-omb-216921>.

⁵ *Stillman v. C.I.A.*, 517 F. Supp. 2d 32, 37 n.4 (D.D.C. 2007) ("The Court recognizes, however, that any secrecy agreement which purports to prevent disclosure of unclassified information would contravene First Amendment rights.")

⁶ Ltr. from Joseph H. Hunt, Assistant Attorney General, Civil Division of the U.S. Dep't of Justice, to Hatchett Book Group Inc. & Javelin, Nov. 4, 2019, <https://twitter.com/PaulaReidCBS/status/1191409346636333056/photo/1>.

⁷ *Supra* note 6 (noting that the requested NDAs "are routinely required with respect to information obtained within the course of one's official responsibilities *or* as a condition for access to classified information. (emphasis added)).

⁸ Including unsigned copies of such agreements or templates used for such agreements.

official's compliance with such agreements, demonstrates that the Civil Division has reason to believe that administration officials have "routinely" signed non-disclosure agreements other than those standard agreements that concern access to classified information.⁹ This letter is attached as Exhibit A. Publicly available information suggests that Assistant Attorney General Joseph Hunt and any other DOJ officials or employees involved in the drafting of the aforementioned letter, or the research or analysis contributing to that letter, are likely to have knowledge about the location of responsive records.

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."¹⁰ The public has a significant interest in whether the federal government has required government officials to sign overly broad NDAs that restrict their ability to share important information with the public gained in the course of government service. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the breadth of information covered by NDAs signed by federal government officials. 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.

This request is primarily and fundamentally for non-commercial purposes.¹¹ 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

⁹ See *supra* note 7.

¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii).

¹¹ See 5 U.S.C. § 552(a)(4)(A)(iii).

also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹²

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.¹³ 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;¹⁴ 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;¹⁵ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁶ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁷ 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.¹⁸

¹² American Oversight currently has approximately 15,002 page likes on Facebook and 94,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 16, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 16, 2020).

¹³ *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹⁴ *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>.

¹⁵ *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>.

¹⁶ *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>.

¹⁷ *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>.

¹⁸ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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.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

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>.

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 Dan McGrath at 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

EXHIBIT A



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

NOV 4 2019

Ms. Carol Ross
Hachette Book Group, Inc.
1290 Avenue of the Americas
New York, NY 10104

Mr. Matt Latimer
Mr. Keith Urbahn
Javelin
203 South Union Street
Alexandria, Virginia 22314

Dear Ms. Ross, Mr. Latimer, and Mr. Urbahn:

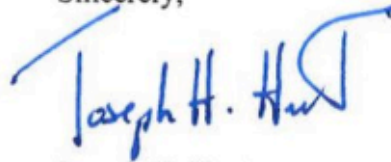
I write regarding Hachette Book Group's recent announcement that it plans to publish a book written by a person who claims to be a current or former "senior official" in the Trump Administration. I understand that Messrs. Latimer and Urbahn represent the author. Please provide a copy of this letter to the author, or if the author is represented by counsel, to the author's attorney.

If the author is, in fact, a current or former "senior official" in the Trump Administration, publication of the book may violate that official's legal obligations under one or more nondisclosure agreements, including nondisclosure agreements that are routinely required with respect to information obtained in the course of one's official responsibilities or as a condition for access to classified information. Such agreements typically require that any written work potentially containing protected information be submitted for pre-publication review. Courts have approved the imposition of a constructive trust to collect the proceeds of the breach generated by an unapproved publication. *See Snepp v. United States*, 444 U.S. 507, 509, 516 (1980). Such remedies, moreover, do "not depend upon whether [the employee's] book actually contained classified information." *Id.* at 511. The government has sought these remedies in recent cases. *See, e.g., United States v. Scherck*, No. 12-cv-754 (E.D. Va. 2013); *United States v. Jones*, No. 10-cv-765 (E.D. Va. 2012).

Ms. Ross, Mr. Latimer, and Mr. Urbahn
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Consistent with these principles, we request that you immediately provide us with your representations that the author did not sign any nondisclosure agreement and that the author did not have access to any classified information in connection with government service. If you cannot make those representations, we ask that you immediately provide either the nondisclosure agreements the author signed or the dates of the author's service and the agencies where the author was employed, so that we may determine the terms of the author's nondisclosure agreements and ensure that they have been followed.

Sincerely,

A handwritten signature in blue ink that reads "Joseph H. Hunt". The signature is written in a cursive style with a large, sweeping initial "J" and a distinct "H".

Joseph H. Hunt
Assistant Attorney General