



May 22, 2020

**VIA ONLINE PORTAL**

Sarah Kotler  
FOIA Officer  
Food and Drug Administration  
5630 Fishers Lane, Room 1035  
Rockville, MD 20857  
Via Online Portal

**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, 45 C.F.R. Part 5, American Oversight makes the following request for records.

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.<sup>1</sup> Since late 2019, the virus has spread across the globe, sickened millions of thousands of people, and resulted in hundreds-of-thousands of deaths.<sup>2</sup> This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government.

American Oversight seeks to shed light on the Food and Drug Administration's response to this pandemic.

**Requested Records**

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

All communications (including emails, email attachments, text messages, messages on messaging platforms (such as Jabber, Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), calendar invitations, or calendar entries)

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<sup>1</sup> *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

<sup>2</sup> *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (May 18, 2020, 8:24 AM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.



between (a) the FDA officials listed in Column A, and (b) any of the individuals listed in Column B, including but not limited to, at the email addresses provided:

Column A	Column B
i. Commissioner Stephen Hahn, and anyone communicating on his behalf, including assistants and schedulers	i. Jared Kushner ( <a href="mailto:jck@who.eop.gov">jck@who.eop.gov</a> ) <sup>3</sup>
ii. Chief of Staff Keagan Lenihan	ii. Cassidy Dumbauld ( <a href="mailto:cassidy.m.dumbauld@who.eop.gov">cassidy.m.dumbauld@who.eop.gov</a> )
iii. Principal Deputy Commissioner Amy Abernethy	iii. Avi Berkowitz ( <a href="mailto:avi@who.eop.gov">avi@who.eop.gov</a> )
iv. Director of the Center for Drug Evaluation and Research Janet Woodcock	iv. Ivanka Trump ( <a href="mailto:imt@who.eop.gov">imt@who.eop.gov</a> )
v. Director of the Center for Biologics Evaluation and Research Peter Marks	v. Julie Radford ( <a href="mailto:julie.t.radford@who.eop.gov">julie.t.radford@who.eop.gov</a> )
vi. Chief Counsel Stacy Amin	vi. Rachael Baitel ( <a href="mailto:rachael.baitel@who.eop.gov">rachael.baitel@who.eop.gov</a> , or any usaid.gov address associated with Ms. Baitel)
vii. Anyone serving as head of the Office of External Affairs	vii. Anyone communicating from an email address ending in ijkfamily.com, trumporg.com, trump.com, kushner.com, or kushnercompanies.com
viii. Anyone serving as White House Liaison	

Please provide all responsive records from February 1, 2020, through the date of the search.

<sup>3</sup> Given the reports establishing both that Mr. Kushner regularly uses WhatsApp messages for communications regarding official government business and Mr. Kushner’s relationship with the relevant agency officials, the agency must conduct an adequate search for responsive WhatsApp messages “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). An adequate search will likely require asking officials with knowledge to aid in identifying responsive records. Although many agencies have policies requiring that official text messages copy an agency employee’s email address, an electronic search of email records would not be a sufficient search for this request because WhatsApp messaging applications do not have the technological capability to permit copying or forwarding to an email address. For reports describing Mr. Kushner’s WhatsApp usage, please see Letter from Elijah E. Cummings, Chairman of House of Representatives Committee on Oversight and Reform to Pat Cipollone, White House Counsel, Mar. 21, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-21.EEC%20to%20Cipollone-WH.pdf>; Nicholas Fandos, *Jared Kushner and Ivanka Trump Use Private Accounts for Official Business, Their Lawyer Says*, N.Y. TIMES, Mar. 21, 2019, <https://www.nytimes.com/2019/03/21/us/politics/jared-kushner-whatsapp.html>.

## 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."<sup>4</sup> The public has a significant interest in the FDA's response to the coronavirus. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the extent of any political influence from the White House or external entities on the FDA's decision-making.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>5</sup> See, e.g., Katherine Eban, "Really Want to Flood NY and NJ": Internal Documents Reveal Team Trump's Chloroquine Master Plan, VANITY FAIR (Apr. 24, 2020), <https://www.vanityfair.com/news/2020/04/internal-documents-reveal-team-trumps-chloroquine-master-plan>; Peter Baker, et al., *Trump's Aggressive Advocacy of Malaria Drug for Treating Coronavirus Divides Medical Community*, N.Y. TIMES, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-trump-malaria-drug.html>.

<sup>6</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>7</sup> American Oversight currently has approximately 15,500 page likes on Facebook and 102,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 21, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 21, 2020).

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.<sup>8</sup> 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;<sup>9</sup> 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;<sup>10</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>11</sup> posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;<sup>12</sup> 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.<sup>13</sup>

Accordingly, American Oversight qualifies for a fee waiver.

#### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 45 C.F.R. § 5.27(b), American Oversight requests that your agency expedite the processing of this request.

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

<sup>9</sup> *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>.

<sup>10</sup> *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>.

<sup>11</sup> *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>.

<sup>12</sup> *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>.

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

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, and American Oversight is primarily engaged in disseminating the information it received 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 external influence over FDA decision-making in the midst of a worldwide pandemic. Because the virus has spread rapidly and has already killed nearly 90,000 people in the United States,<sup>14</sup> there is plainly an urgent need to inform the public about whether and to what extent the FDA is under pressure to make decisions and take action for reasons that are not based on the best scientific information available. The exceptionally widespread news reporting on the White House's support for hydroxychloroquine despite the lack of scientific support for its use demonstrates that the public urgently needs information about the federal government's efforts and policies concerning the subject matter of this request.<sup>15</sup> Second, there is also widespread public concern that public health officials are being prevented from speaking about the coronavirus more broadly,<sup>16</sup> leaving open questions about the justifications for governmental action and inaction during the pandemic.

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<sup>14</sup> *Coronavirus in the U.S.: Latest. Map and Case Count*, N.Y. TIMES (May 18, 2020, 2:07 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>15</sup> See, e.g., Eban, *supra* note 5; Baker et al., *supra* note 5; see also Caitlin Oprysko, *Trump Says He's Taking Unproven Anti-Malarial Drug*, POLITICO (May 18, 2020, 4:45 PM), <https://www.politico.com/news/2020/05/18/trump-says-hes-taking-unproven-anti-malarial-drug-265546>; Toluse Olorunnipa et al., *Drug Promoted by Trump as Coronavirus Game Changer Increasingly Linked to Deaths*, WASH. POST (May 15, 2020, 6:41 PM); [https://www.washingtonpost.com/politics/drug-promoted-by-trump-as-coronavirus-game-changer-increasingly-linked-to-deaths/2020/05/15/85d024fe-96bd-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/politics/drug-promoted-by-trump-as-coronavirus-game-changer-increasingly-linked-to-deaths/2020/05/15/85d024fe-96bd-11ea-9f5e-56d8239bf9ad_story.html); Michael D. Shear & Maggie Haberman, *Health Dept. Official Says Doubts on Hydroxychloroquine Led to His Ouster*, N.Y. TIMES (Updated May 14, 2020), <https://www.nytimes.com/2020/04/22/us/politics/rick-bright-trump-hydroxychloroquine-coronavirus.html>; Lisette Voytko, *Trump Has 'Small,' 'Distant Link' To Sanofi, French Drugmaker Of Hydroxychloroquine*, FORBES (Apr. 7, 2020, 12:55 PM), <https://www.forbes.com/sites/lisettevoytko/2020/04/07/trump-has-small-distant-link-to-sanofi-french-drugmaker-of-hydroxychloroquine/#2169e7fb7260>; Philip Bump, *Trump's Promotion of Hydroxychloroquine is Almost Certainly About Politics, Not Profits*, WASH. POST (Apr. 7, 2020, 11:24 AM), <https://www.washingtonpost.com/politics/2020/04/07/trumps-promotion-hydroxychloroquine-is-almost-certainly-about-politics-not-profits/>.

<sup>16</sup> See, e.g., Shear & Haberman, *supra* note 15; Ashley Parker, et al., *Under Trump, Coronavirus Scientists Can Speak --- As Long As They Mostly Toe the Line*, WASH. POST (Apr. 22, 2020, 8:20 PM), [https://www.washingtonpost.com/politics/under-trump-coronavirus-scientists-can-speak--as-long-as-they-toe-the-line/2020/04/22/a0a67c12-84b9-11ea-878a-86477a724bdb\\_story.html](https://www.washingtonpost.com/politics/under-trump-coronavirus-scientists-can-speak--as-long-as-they-toe-the-line/2020/04/22/a0a67c12-84b9-11ea-878a-86477a724bdb_story.html); Michael Shear & Maggie Haberman, *Pence Will Control All*



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 external influence over the FDA's coronavirus response. American Oversight's request seeks information that can shed light on whether and to what extent political and other external influences are trumping science at the FDA. The public urgently needs the information to understand the extent of the still-growing health crisis, and how the federal government is responding to it.

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,<sup>17</sup> 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."<sup>18</sup> 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.<sup>19</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>20</sup>

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*Coronavirus Messaging from Health Officials*, N.Y. TIMES, Feb. 27, 2020,

<https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html>.

<sup>17</sup> 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).

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

<sup>19</sup> See *supra* note 7.

<sup>20</sup> 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*

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 Records Act and FOIA.<sup>21</sup> 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.<sup>22</sup>
- 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,<sup>23</sup> and many agencies

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*Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT,  
<https://www.americanoversight.org/sessions-letter>.

<sup>21</sup> 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).

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

<sup>23</sup> 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>.

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.

### **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 Christine Monahan at [foia@americanoversight.org](mailto:foia@americanoversight.org) or



(202) 869-5244. 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