



July 23, 2020

VIA EMAIL AND FOIA ONLINE

Privacy Office
Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
STOP-0655
Washington, DC 20528
foia@hq.dhs.gov

FOIA Officer
U.S. Customs and Border Protection
90 K Street NE
FOIA Division
Washington, DC 20229
via FOIA Online

Re: Expedited Freedom of Information Act Request

Dear FOIA Officers:

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.

Following the police killing of George Floyd in Minneapolis on May 25, 2020, thousands of people have held daily protests in Portland, Oregon and nationwide. Law enforcement has sometimes responded to these protests with violence, including firing smoke canisters, pepper spray, and rubber bullets.¹ After six weeks of daily demonstrations, the Department of Homeland Security deployed federal agents to the Portland to suppress the protests, exacerbating concerns—including from Oregon’s own government—about the use of excessive force against protesters.² On July 16, 2020, Acting Secretary of Homeland Security Chad Wolf met with representatives of the Portland Police Association, the union representing officers in the Portland Police Bureau, even while Mayor Ted Wheeler and Portland Police Chief Chuck Lovell declined to attend.³

¹ Jonathan Levinson, *Portland Police Under Scrutiny for Dangerous Crowd Control Munitions*, OPB (July 2, 2020, 6:00 AM), <https://www.opb.org/news/article/crowd-control-weapons-portland-police-rubber-foam-bullets-tear-gas/>.

² Gillian Flaccus, *Chaotic Protests Prompt Soul-Searching in Portland, Oregon*, Associated Press, July 15, 2020, <https://apnews.com/4533bdf304692961ece51a828a1f5600>.

³ Alex Zielinski, *DHS Secretary Met With Portland Police Union President Thursday*, Portland Mercury (July 17, 2020, 4:42 PM), <https://www.portlandmercury.com/blogtown/2020/07/17/28649667/dhs-secretary-met-with-portland-police-union-president-thursday>.



American Oversight seeks records with the potential to shed light on the response of federal agents to local protests.

Requested Records

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

All email communications (emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) between (a) the agency officials listed below and (b) Portland Police Association President Daryl Turner or any representative of the Portland Police Association, including anyone with an email address ending in @ppavigil.org.

DHS Officials:

- a. Acting Secretary Chad Wolf, or any person communicating on his behalf, such as an assistant or scheduler
- b. Senior Official Performing the Duties of the Deputy Secretary, Ken Cuccinelli, or any person communicating on his behalf, such as an assistant or scheduler
- c. Acting Chief of Staff, John Gountanis
- d. Executive Secretary, Clark Barrow
- e. Senior Official Performing the Duties of the General Counsel, Chad Mizelle
- f. Assistant Secretary for Public Affairs Dirk Vande Beek
- g. Principal Deputy Assistant Secretary, Public Affairs, Alexei Woltornist
- h. Acting Deputy Assistant Secretary, Media Operations, Sofia Boza-Holman
- i. Deputy Assistant Secretary, Strategic Communications, Melika Willoughby McKinnis

CBP Officials:

- j. Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, Mark Morgan, or any person communicating on his behalf, such as an assistant or scheduler
- k. Anyone Serving as Chief of Staff to the Commissioner
- l. Deputy Commissioner, Robert Perez

Please produce all responsive records from July 10, 2020, through the date of search.

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."⁴ The public has a significant interest in whether federal police forces are using force lawfully or whether force has been used inappropriately on citizens lawfully gathered to exercise fundamental rights. Records with the potential to shed light on these matters would contribute significantly to public understanding of operations of the federal government, including whether federal law enforcement officials were instructed to limit the amount of identifying information they present to the public and who directed the use of force on protestors gathered throughout the country. 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.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

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ *See id.*

⁶ American Oversight currently has approximately 15,500 page likes on Facebook and 104,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited July 17, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 17, 2020).

⁷ News, American Oversight, <https://www.americanoversight.org/blog>.

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 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 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 relevant 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 the information requested is urgently needed in order to inform the public concerning actual or alleged

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>.

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>.

government activity, and American Oversight is primarily engaged in disseminating the information it receives from public records requests to the public.¹³

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: the role that federal law enforcement agencies play in suppressing protests against police violence in Portland, Oregon, against the objection of the city's government.¹⁴

First, American Oversight has requested records with the potential to shed light on the administration's decision to deploy federal agents to Portland, which raises concerns about potential excessive use of force and the violation of protesters' civil rights. Since the arrival of federal law enforcement officers in Portland, violent suppression of protest has continued, inciting further demonstrations,¹⁵ even as local police have been restricted from using such measures against peaceful protestors,¹⁶ and there is plainly a need to inform the public about the role federal agents are playing in responding to protests. Portland's mayor has asked federal officers to "stay inside their building, or leave Portland altogether,"¹⁷ and activists have expressed concern that violent crowd control tactics have incited further protests,¹⁸ creating concern and confusion about federal agents' continued presence. The widespread and exceptional media interest in protests against police violence and subsequent suppression efforts from law enforcement demonstrates that the public urgently needs information about the federal government's efforts and policies concerning the subject matter of this request.¹⁹

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 DHS's decisions regarding the deployment of

¹³ See 28 C.F.R. § 16.5(e)(1)(ii); 6 C.F.R. § 5.5(e)(ii).

¹⁴ Andrew Naughtie, *Portland Protesters Hit with Tear Gas and Snatched into Unmarked Vans as Federal Officers Crack Down*, The Independent, July 17, 2020, <https://www.independent.co.uk/news/world/americas/portland-protests-police-violence-tear-gas-oregon-a9624756.html>.

¹⁵ Flaccus, *supra* note 2.

¹⁶ Jim Ryan, *Tear Gas Deployed as Federal Officers Disperse Protesters Overnight in Downtown Portland*, OregonLive, July 16, 2020, <https://www.oregonlive.com/portland/2020/07/tear-gas-deployed-as-federal-officers-disperse-protesters-overnight-in-downtown-portland.html>.

¹⁷ Rebecca Ellis, *Portland Mayor on Federal Officers: 'We Do Not Need or Want Their Help,'* OPB (July 14, 2020, 5:58 PM), <https://www.opb.org/news/article/portland-mayor-ted-wheeler-tweets-federal-officers/>.

¹⁸ See Flaccus, *supra* note 2.

¹⁹ Sergio Olmos & Mike Baker, *Feds Vowed to Quell Unrest in Portland. Local Leaders Are Telling Them to Leave.*, N.Y. Times, July 17, 2020, <https://www.nytimes.com/2020/07/17/us/portland-protests.html>; Katie Shepherd, *'It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans Are*

federal agents to suppress protests against police violence. American Oversight’s request seeks information that can shed light on DHS policies for sending federal law enforcement agents to states and cities, including against the objection of local government, and subsequent shows of force. The public, including Congresspeople, state and local officials, and activists at risk of bodily harm, urgently need the information to make decisions regarding the expression of constitutionally guaranteed rights at a time of unprecedented civil unrest.

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 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:

Detaining Them, Wash. Post (July 17, 2020, 6:58 AM),

<https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

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 15,500 page likes on Facebook and 104,300 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight/> (last visited July 20, 2020); American

Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 17, 2020).

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->

- 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 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

[learned-from-the-doj-documents](https://www.americanoversight.org/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