



July 17, 2020

VIA EMAIL

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.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, American Oversight makes the following request for records.

Nearly 140,000 people in the United States have died as a result of the ongoing coronavirus pandemic.¹ Coronavirus case counts are now regularly reaching record daily high levels, while the number of deaths caused by the virus are also increasing.² In the midst of this worsening public health crisis, the U.S. Department of Health and Human Services (HHS) announced that hospitals and state representatives should no longer report hospital capacity and utilization data to the Centers for Disease Control and Prevention (CDC).³ Shortly following this change, CDC briefly removed the hospital capacity and utilization data it had previously posted to its website with regular updates. The HHS component then restored the previous data but indicated that it would no longer update the public site with new data after July 14, 2020.⁴ Access to this hospital capacity and utilization data is crucial for allowing the public and policymakers to understand the progress of the pandemic and the risks to the healthcare system, as well as risks of further loss of life. HHS Assistant Secretary Brett Giroir acknowledged that this data is “really critical to all of us,” and that HHS “drive[s] the response based on” it.⁵

¹ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Updated July 17, 2020, 8:42 AM), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&pgtype=Article&state=default&module=style-coronavirus&variant=show®ion=TOP_BANNER&context=storylines_menu.

² Faith Karimi & Steve Almasy, *More Than 940 Deaths Reported in One Day As US Coronavirus Cases Shatter Another Record*, CNN (July 17, 2020, 9:44 AM), <https://www.cnn.com/2020/07/17/health/us-coronavirus-friday/index.html>.

³ Pien Huang & Selena Simmons-Duffin, *White House Strips CDC of Data Collection Role For COVID-19 Hospitalizations*, NPR (July 15, 2020, 1:31 PM), <https://www.npr.org/sections/health-shots/2020/07/15/891351706/white-house-strips-cdc-of-data-collection-role-for-covid-19-hospitalizations>.

⁴ Lena H. Sun & Amy Goldstein, *Disappearance of Covid-19 Data from CDC Website Spurs Outcry*, Wash. Post (July 16, 2020, 7:52 PM), <https://www.washingtonpost.com/health/2020/07/16/coronavirus-hospitalization-data-outcry/#click=https://t.co/YvWmxoyEb>.

⁵ *Id.*



American Oversight seeks records reflecting this data to ensure that the public has access to critical information that informs the federal government's response to this pandemic and which can inform the public about the risks of increased loss of life.

Requested Records

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

Records sufficient to show the daily hospital capacity and utilization data reported to HHS (or otherwise to the Administration) by hospitals or state representatives for each day starting from July 15, 2020, to the date of the search.⁶

To the extent that HHS has records that aggregate the data reported from hospitals or state representatives, those records are responsive to this request and raw data reported by hospitals and state representatives need not be produced. If HHS does not have any records aggregating the daily data reported by hospitals and state representatives, then the raw data reported 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."⁷ The public has a significant interest in understanding whether the federal government's response to the pandemic is adequate in light of the risks of healthcare systems being overwhelmed in different regions of the country. Moreover, the public has an urgent need for information about the requested hospital capacity and utilization data in order to assess the risks the pandemic poses and the potential for increased loss of life. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including

⁶ Letters from Vice President Pence and Secretary Azar have directed hospitals or state representatives with hospital data to report hospital capacity and utilization data, and recent HHS guidance has updated those directives. This is the data that this request seeks. See Ltr. from Vice President Pence to Hospital Administrators, Mar. 29, 2020, <https://www.whitehouse.gov/briefings-statements/text-letter-vice-president-hospital-administrators/>; Ltr. from Alex Azar, Sec'y of Health and Human Servs., to Hospital Administrators, Apr. 10, 2020, <https://www.fema.gov/news-release/2020/04/10/coronavirus-covid-19-pandemic-hhs-letter-hospital-administrators>; U.S. Dep't of Health and Human Servs., COVID-19 Guidance for Hospital Reporting and FAQs, Updated July 10, 2020, <https://www.hhs.gov/sites/default/files/covid-19-faqs-hospitals-hospital-laboratory-acute-care-facility-data-reporting.pdf>.

⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

whether the federal government is adequately using and disseminating critical data concerning the consequences of the coronavirus pandemic. 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.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 federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁴ posting records and analysis regarding the Department

⁸ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ American Oversight currently has approximately 15,600 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).

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-business>.

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>.

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), 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 about the federal government's response to a pandemic that has already killed nearly 140,000 people in the United States, and which is now apparently worsening.¹⁶ As described above, in the midst of this worsening public health crisis, HHS announced that hospitals and state representatives should no longer report hospital capacity and utilization data to the CDC.¹⁷ Shortly following this change, CDC briefly removed the hospital capacity and utilization data it had previously posted to its website with regular updates. The HHS component then restored the previous data but indicated that it would no longer update the public site with new data after July 14, 2020.¹⁸ Access to this hospital capacity and utilization data is crucial for allowing the public and policymakers to understand the progress of the pandemic and the risks to the healthcare system as well as risks of further loss of life. HHS Assistant Secretary Brett Giroir acknowledged that this data is "really critical to all of us," and that HHS "drive[s] the response based on" it.¹⁹ The public has an urgent need to access this data in a timely matter in order to make informed judgments about the risks of the pandemic and to petition government officials to respond effectively to those risks.

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

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

¹⁶ *Supra* notes 1 & 2.

¹⁷ Pien Huang & Selena Simmons-Duffin, *White House Strips CDC of Data Collection Role For COVID-19 Hospitalizations*, NPR (July 15, 2020, 1:31 PM), .

¹⁸ Lena H. Sun & Amy Goldstein, *Disappearance of Covid-19 Data From CDC Website Spurs Outcry*, Wash. Post (July 16, 2020, 7:52 PM), .

¹⁹ *Id.*

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).

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), 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

²² American Oversight currently has approximately 15,600 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).

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>.

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 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 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,

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