



July 14, 2020

VIA EMAIL

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**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.

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 more than 12 million people, and resulted in hundreds-of-thousands of deaths.<sup>2</sup> One of the first public officials to have identified the scope of the threat from this pandemic appears to have been Dr. Carter Mecher, Senior Adviser to the Office of Public Health for the U.S. Department of Veterans Affairs, noting in emails as early as January 28, 2020 that both the World Health Organization and the U.S. Centers for Disease Control and Prevention (CDC)

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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 (July 9, 2020, 2:26 PM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.



“were behind the curve.”<sup>3</sup> Dr. Mecher also shared his forecast for total veteran deaths and solicited ideas for response strategies.<sup>4</sup>

American Oversight seeks the email chains on which Dr. Mecher, as well as other top officials, shared these and other warnings and analysis.

### **Requested Records**

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

All email communications (including email messages, complete email chains, calendar invitations, and attachments thereto) sent or received by Dr. Carter Mecher (including on his personal email account [cmercher@charter.net](mailto:cmercher@charter.net)) that include the phrase “Red Dawn” in the subject line, from January 1, 2020, through the date of the search.

American Oversight believes that at least forty-two separate iterations of email chains including this phrase in the subject line exist, and that they each may be several hundred pages. Nonetheless, because these email chains should be readily identifiable and because they include external parties such that Exemption 5 should not apply, American Oversight believes that your agency should be able to promptly produce these records with minimal burden.

### **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 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 the administration’s early response to the coronavirus. Because the virus has spread rapidly

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<sup>3</sup> Patricia Kime, ‘Any Way You Cut It, This Is Going to Be Bad:’ VA Official Sounded Early COVID-19 Warning, Military.com, Apr. 13, 2020, <https://www.military.com/daily-news/2020/04/13/any-way-you-cut-it-going-be-bad-va-official-sounded-early-covid-19-warning.html>.

<sup>4</sup> *Id.*

and has already more than 130,000 of people in the United States,<sup>5</sup> there is plainly an urgent need to inform the public about the extent to which senior health officials were ringing alarm bells that were not acted upon. The exceptionally widespread news reporting on coronavirus — including regarding whether and to what extent the government’s slow response contributed to the current circumstances — demonstrates that the public urgently needs information about the federal government’s efforts and policies concerning the subject matter of this request.<sup>6</sup>

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 what was known when by the nation’s top health officials regarding coronavirus. The Democratic and Republican nominating conventions are less than two months away, and voting in the general election will start in less than four months.<sup>7</sup> Voters’ evaluation of the adequacy of the government’s response to the coronavirus—including whether and to what extent the government failed to take action when its own officials were ringing alarm bells—is likely to play a significant role in this year’s elections.<sup>8</sup> Thus, there is an urgent need to inform the public regarding what

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<sup>5</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (updated July 9, 2020, 2:26 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>6</sup> See, e.g., Opinion, Isaac Sebenius & James K. Sebenius, *How Many Needless Covid-10 Deaths Were Caused by Delays in Responding? Most of Them*, Stat, June 19, 2020, <https://www.statnews.com/2020/06/19/faster-response-prevented-most-us-covid-19-deaths/>; Eric Lipton et al., *He Could Have Seen What Was Coming; Behind Trump’s Failure on the Virus*, N.Y. Times (updated May 4, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>; Aaron Blake, *2 Months in the Dark: The increasingly Damning Timeline of Trump’s Coronavirus Response*, L.A. Times (Apr. 21, 3:40 PM), <https://www.washingtonpost.com/politics/2020/04/07/timeline-trumps-coronavirus-response-is-increasingly-damning/>; David S. Clout et al., *How Trump Let the U.S. Fall Behind the Curve on Coronavirus Threat*, L.A. Times (Apr. 19, 2020, 5:00 AM), <https://www.latimes.com/world-nation/story/2020-04-19/coronavirus-outbreak-president-trump-slow-response>; Jacquelyn Corley, *U.S. Government Response to COVID-10 Was Slow. But How Does It Compare to Other Countries?*, Forbes (Apr. 10, 2020), <https://www.forbes.com/sites/jacquelyncorley/2020/04/10/us-government-response-to-covid-19-was-slow-but-how-does-it-compare-to-other-countries/#3813e1b86dc2>;

<sup>7</sup> Catherine Kim et al., *The 2020 Election Calendar*, Vox (May 13, 2020, 1:12 PM), <https://www.vox.com/2019/6/26/18693259/2020-presidential-election-calendar-primaries>.

<sup>8</sup> See, e.g., Liz Hamel, *KFF Health Tracking Poll – May 2020*, KFF, May 27, 2020, <https://www.kff.org/coronavirus-covid-19/report/kff-health-tracking-poll-may-2020/>; Ken Thomas & Michael C. Bender, *Trump, Biden Place Opposing Bets on Voters’ View of Coronavirus*, Wall St. J. (May 23, 2020, 12:01 PM), <https://www.wsj.com/articles/trump-biden-place-opposing-bets-on-voters-view-of-coronavirus-11590249662>; Mark Jurkowitz, *Americans Are Following News About Presidential Candidates Much Less Closely than COVID-19 News*, Pew Res. Ctr., May 22, 2020, <https://www.pewresearch.org/fact-tank/2020/05/22/americans-are>

top officials were saying to each other and experts outside the federal government during the early months of the pandemic, and so it is vital that records reflecting this information be released expeditiously.

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>9</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>10</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>11</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>12</sup>

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[following-news-about-presidential-candidates-much-less-closely-than-covid-19-news/](#); *Most Americans Say Trump Was Too Slow in Initial Response to Coronavirus Threat*, Pew Res. Ctr., Apr. 16, 2020, <https://www.pewresearch.org/politics/2020/04/16/most-americans-say-trump-was-too-slow-in-initial-response-to-coronavirus-threat/>.

<sup>9</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>10</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>11</sup> 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 9, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 9, 2020).

<sup>12</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>

Accordingly, American Oversight's request satisfies the criteria for expedition.

### **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>13</sup> The public has a significant interest in the timeliness and effectiveness of the government's response to a global pandemic that has killed more than 130,000 people in the U.S. alone.<sup>14</sup> Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including what top officials knew and were warning at different points during the course of the 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.<sup>15</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>16</sup>

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses

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[sell-nuclear-technology-to-saudi-arabia](https://www.americanoversight.org/sessions-letter); *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, American Oversight, <https://www.americanoversight.org/sessions-letter>.

<sup>13</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>14</sup> *Supra* note 5.

<sup>15</sup> *See* 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>16</sup> *Supra* note 13.

posted to its website.<sup>17</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>18</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>19</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>20</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>21</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>22</sup>

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:

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<sup>17</sup> *News*, American Oversight, <https://www.americanoversight.org/blog>.

<sup>18</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>19</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>20</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>21</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>22</sup> *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, American Oversight, <https://www.americanoversight.org/sessions-letter>.

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request includes all prior messages sent or received in the requested email chains, 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>23</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>24</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>25</sup> 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

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<sup>23</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>24</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>25</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>.

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 H. 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,



Austin R. Evers  
Executive Director  
American Oversight