



August 5, 2020

VIA EMAIL

Federal Emergency Management Agency
FOIA Officer
500 C Street SW, Room 840
Washington, DC 20472
fema-foia@fema.dhs.gov

Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528
foia@hq.dhs.gov

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.¹ Since late 2019, the virus has spread across the globe, sickened millions of people, and resulted in over 700,000 deaths.² In the United States, case numbers and fatalities are

¹ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

² *Coronavirus Map: Tracking the Global Outbreak*, N.Y. Times (Aug. 5, 2020, 8:21 AM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.



surging,³ tests are still in short supply,⁴ and essential workers still struggle to find necessary PPE and other equipment to fight the spread of the disease.⁵

American Oversight seeks records with the potential to shed light on the federal government's management of the nation's supply chain.

Requested Records

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

1. All records reflecting any directive, protocol, or guidance regarding bidding against state or local governments or healthcare facilities for medical equipment or supplies needed to respond to the coronavirus pandemic, including but not limited to personal protective equipment (PPE), ventilators, testing equipment, and sanitation supplies.

Please search for responsive records from March 1, 2020, through the date of the search.

2. All records reflecting any directive, protocol, or guidance regarding rerouting, taking precedence over, seizing, blockading, or putting a hold on medical supplies or equipment needed to respond to the coronavirus pandemic—including but not limited to personal protective equipment (PPE), ventilators, testing equipment, or sanitation supplies—that had previously been ordered by a state or local official, or administrators of healthcare facilities or emergency medical services.⁶

³ See, e.g. Antonia Noori Farzan, et al., *U.S. Averages More Than 1,000 Coronavirus-Related Deaths for Ninth Day in a Row*, Wash. Post (Aug. 4, 2020, 11:49 AM), <https://www.washingtonpost.com/nation/2020/08/04/coronavirus-covid-live-updates-us/>.

⁴ Sarah Mervosh & Manny Fernandez, *'It's Like Having No Testing': Coronavirus Test Results Are Still Delayed*, N.Y. Times (Aug. 5, 2020, 8:55 AM), <https://www.nytimes.com/2020/08/04/us/virus-testing-delays.html>.

⁵ See e.g., William Wan, *America is Running Short on Masks, Gowns and Gloves. Again*, Wash. Post (July 8, 2020, 8:00 PM), <https://www.washingtonpost.com/health/2020/07/08/ppe-shortage-masks-gloves-gowns/>.

⁶ Public reporting indicates that DHS and other federal agencies have rerouted, seized, taken precedence over or temporarily delayed shipments of supplies ordered by government officials and hospital systems. See, e.g. Zolan Kanno-Youngs & Jack Nicas, *'Swept Up by FEMA': Complicated Medical Supply System Sows Confusion*, N.Y. Times, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>; Noam N. Levey, *Hospitals Say Feds are Seizing Masks and Other Coronavirus Supplies Without a Word*, L.A. Times (Apr. 7, 2020, 2:97 PM),

Please search for responsive records from March 1, 2020, through the date of the search.

American Oversight believes your agency is in the best position to know the location of these records. At a minimum, a reasonable search would include the offices of Administrator Graynor, officials leading the Supply Chain Task Force,⁷ and officials serving on or as a liaison to the White House coronavirus task force.

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."⁸ The public has a significant interest in the federal government's response to supply chain issues created by the coronavirus pandemic.⁹ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including elucidating how officials are managing the acquisition and distribution of supplies needed to respond to the pandemic.¹⁰ American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly

<https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>.

⁷ *Supra* note 3.

⁸ 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1.

¹⁰ *See, e.g.,* Olivia Rubin, et al., *Despite Trump Claim, 13 States Say Some Orders for Coronavirus Supplies Still Unfilled*, ABC News (July 23, 2020, 3:03 PM),

<https://abcnews.go.com/Health/trump-claim-12-states-orders-coronavirus-supplies-unfilled/story?id=71946598>; Toluse Olorunnipa, et al., *Governors Plead for Medical Equipment From Federal Stockpile Plagued by Shortages and Confusion*, Wash. Post (Mar. 31, 2020, 3:39 PM), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html; Anita Kumar & Gavin Bade, *States Still Baffled Over How to Get Coronavirus Supplies from Trump*, Politico (Apr. 13, 2020, 7:02 AM), <https://www.politico.com/states/florida/story/2020/04/13/states-still-baffled-over-how-to-get-coronavirus-supplies-from-trump-1275083>.

available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹¹ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹²

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website.¹³ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to the Trump Administration's contacts with Ukraine and analyses of those contacts;¹⁴ posting records and editorial content about the federal government's response to the Coronavirus pandemic;¹⁵ 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;¹⁶ the posting of records related to an ethics waiver received by a

¹¹ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹² 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 23, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 23, 2020).

¹³ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

¹⁴ *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

¹⁵ See generally *The Trump Administration's Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; see, e.g., *'We've All Given Up Getting a Straight Answer From You Guys: Frustrated Emails Between Illinois Governor's Office and White House*, <https://www.americanoversight.org/weve-all-given-up-getting-a-straight-answer-from-you-guys-frustrated-emails-between-illinois-governors-office-and-white-house>.

¹⁶ 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>.

senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;¹⁷ and posting records and analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹⁸

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and your agency's regulations, 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: clarifications concerning how the federal government is managing the nation's supply chain, especially with regards to competition for equipment between the federal government, states, and healthcare facilities.¹⁹

First, American Oversight has requested records with the potential to shed light on the steps the administration has taken to respond to the novel coronavirus outbreak, which has resulted in a major public health emergency. Because the virus has already killed over 150,000 people in the United States²⁰ and is on the rise in many areas of the country

¹⁷ *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>.

¹⁸ See generally *Swamp Airlines: Chartered Jets at Taxpayer Expense*, American Oversight, <https://www.americanoversight.org/investigation/swamp-airlines-private-jets-taxpayer-expense>; see e.g. *New Information on Pompeo's 2017 Trips to His Home State*, American Oversight, <https://www.americanoversight.org/new-information-on-pompeos-2017-trips-to-his-home-state>.

¹⁹ See, e.g., Sarah McCammon, *After 'Severe' Delays, 6 States Band Together To Buy Coronavirus Tests*, NPR (Aug. 4, 2020, 6:17 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/04/899116648/after-severe-delays-several-states-band-together-to-buy-coronavirus-tests>; Rubin, *supra* note 10.

²⁰ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Aug. 5, 2020, 8:21 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

states,²¹ there is plainly an urgent need to inform the public about how the leaders of the federal government’s supply chain management efforts have been and are continuing to respond to the virus. The widespread and exceptional media interest on coronavirus demonstrates that the public urgently needs information about the federal government’s efforts and policies concerning the subject matter of this request.²²

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 specifically about federal policies on competing directly with states and hospitals for equipment. American Oversight’s request seeks information that can shed light on the Supply Chain Taskforce’s and other federal leaders’ policies for managing the nation’s supply needs. Widely-reported confusion amongst governors, local elected officials, and healthcare leaders about how to obtain needed supplies—including when to rely on the federal government—,²³ has not been clarified. To the contrary, state and healthcare leaders continue to struggle to obtain urgently needed equipment and remain confused about the federal government’s role.²⁴ The general public, state and local officials, and healthcare providers, urgently need better information on the federal government’s policies about supply chain management in order to determine how to best obtain equipment needed to respond to the virus.

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,²⁵ 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.”²⁶

²¹ See, e.g. Farzan, *supra* note 3.

²² Antonia Noori Farzan, et al., *Live updates: Trump Insists Virus ‘Will Go Away Like Things Go Away’ as Deaths Surge, Economy Shudders*, Wash. Post (Aug 5, 2020, 10:19 AM), https://www.washingtonpost.com/coronavirus/?itid=sn_coronavirus_1; Rosa Flores & Sara Weisfeldt, *Live Updates: ICUs Are Full in More Than 50 Florida Hospitals*, CNN (Aug. 5, 2020, 8:19 AM) <https://www.cnn.com/world/live-news/coronavirus-pandemic-08-05-20-intl/index.html>.

²³ See, e.g., Zolan, *supra* note 6; *supra* note 10.

²⁴ See, e.g. Mervosh, *supra* note 4; McCammon, *supra* note 19; Katherine J. Wu, *‘It’s Like Groundhog Day’: Coronavirus Testing Labs Again Lack Key Supplies*, Wash. Post, July 23, 2020, <https://www.nytimes.com/2020/07/23/health/coronavirus-testing-supply-shortage.html>; Alex Haring, *Illinois Gov. Pritzker Says States Were Forced to Compete in ‘Sick Hunger Games’ Competition for PPE Without National Coronavirus Plan*, CNBC (July 8, 2020, 4:30 PM), <https://www.cnn.com/2020/07/08/coronavirus-illinois-gov-pritzker-says-states-were-forced-compete-in-sick-hunger-games-competition-for-ppe.html>.

²⁵ 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).

²⁶ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

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.²⁷ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁸

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.
- 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

²⁷ American Oversight currently has approximately 15,600 page likes on Facebook and 104,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight> (last visited Aug. 5, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Aug. 5, 2020).

²⁸ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>; see, e.g., *Emails and Resume of Trump's Pick to Head Government Personnel Office*, American Oversight, <https://www.americanoversight.org/emails-and-resume-of-trumps-pick-to-head-government-personnel-office>; *CDC Calendars from 2018 and 2019: Pandemic-Related Briefings and Meetings*, American Oversight, <https://www.americanoversight.org/cdc-calendars-from-2018-and-2019-pandemic-related-briefings-and-meetings>; *State Department Releases Ukraine Documents to American Oversight*, American Oversight, <https://www.americanoversight.org/state-department-releases-ukraine-documents-to-american-oversight>; *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.²⁹ 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.³⁰

- 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,³¹ 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.

²⁹ 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).

³⁰ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

³¹ 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 Megan Field at foia@americanoversight.org or 202.897.2465. 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