



July 31, 2020

VIA EMAIL

Privacy Office, Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, DC 20528-065
I&AFOIA@hq.dhs.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, 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, DHS deployed federal agents to Portland to suppress the protests, exacerbating concerns—including from the Oregon government—about the use of excessive force against protesters.² In an email to other officials in the Office of Intelligence & Analysis, Acting Under Secretary for Intelligence classified some of these protestors as “Violent Antifa Anarchist inspired” rather than “violent opportunists,” the previous classification term used. *See* Ex. A.

Requested Records

American Oversight requests that the Office of Intelligence & Analysis produce the following records within twenty business days:

All decision memoranda, directives, policy interpretations, job aids, or guidance signed, approved, or otherwise adopted by Acting Under Secretary Brian Murphy, Stephanie Dobitsch, or Director Bryan Pendleton, Homeland Identities, Targeting, and Exploitation

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>.



Center (HITEC). This request includes any document establishing, modifying, clarifying, or rescinding any policy, legal or policy interpretation, or practice, whether presented as a memorandum, email, letter, guidance document, or in any other form.

We request responsive records maintained on both classified and unclassified systems be produced, as we believe there is likely segregable non-exempt material maintained on the classified system. For example, a recent DHS I&A memorandum regarding “expanded intelligence activities necessary to mitigate the significant threat to homeland security” was classified “UNCLASSIFIED//FOR OFFICIAL USE ONLY” (U//FOUO).³ Additionally, to the extent that records contain both classified and unclassified portion-markings, sections portion-marked at the U//FOUO or “Sensitive But Unclassified” (SBU) levels are segregable and should be produced. Therefore, we anticipate significant non-exempt materials in response to multiple search terms above.

Please provide all responsive records from May 25, 2020, to the date of the 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 and to what extent the federal government is surveilling protestors, and what protections are in place to prevent abuses. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including how the federal government is responding to protestors in Portland and other cities. 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

³ Steve Vladeck & Benjamin Wittes, *DHS Authorizes Domestic Surveillance to Protect Statues and Monuments*, Lawfare (July 20, 2020, 2:33 PM), <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>.

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ *See id.*

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 regular substantive analyses posted to its website.⁷ 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;⁸ posting records and editorial content about the federal government's response to the Coronavirus pandemic;⁹ 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;¹⁰ 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 and posting records and analysis of federal

⁶ 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 31, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 31, 2020).

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

⁸ *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁹ 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., *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>.

¹⁰ 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>.

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>.

officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹²

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:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- 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 Records Act and FOIA.¹³ 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.¹⁴

¹² 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>.

¹³ 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).

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

- 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,¹⁵ 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.

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.

¹⁵ 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>.

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 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

EXHIBIT A

From: Murphy, Brian [REDACTED]

Sent: Saturday, July 25, 2020 11:17:05 AM

To: Jen, Horace [REDACTED]; Hanna, Matthew [REDACTED]; Taylor, Robin [REDACTED]; Reuther, Kurt [REDACTED]; Smislova, Melissa [REDACTED]; DOBITSCH, STEPHANIE [REDACTED]; Robinson, Charles [REDACTED]

Subject: Immediate change of definitions for Portland

Team

Read the entire email and acknowledge receipt

Call my cell with questions or comments

Starting now for Portland replace the V.O. definition accompanying our FIRS and OSIRS to VIOLENT ANTIFA ANARCHISTS INSPIRED (VAAI). Why? Myself and I&A leaders have been reviewing the Portland FIRS, OSIRS, Baseball cards of the arrested and FINTEL as well as the Ops info. The individuals are violently attacking the Federal facilities based on those ideologies. We can't say any longer that this violent situation is opportunistic. Additionally, we have overwhelmingly intelligence regarding the ideologies driving individuals towards violence and why the violence has continued. A core set of Threat actors are organized, show up night after night, share common TTPs and drawing on like minded individuals to their cause. I recognize we may not be able to attribute every individual as VAAI however we need to look at the totality of the intelligence both current and previous and recognize the motivation for the violence and why people have shown up to commit violence for about 60 days. And why individuals are using social media to encourage the VAAI on the ground to carry out acts of violence.

Not every threat actor maybe be a VAAI. For example should we have the intel to show us something different we will obviously adjust.

The VAAI is specific to Portland and specific to the Federal State and Local facilitates under violent assault. If similar situations arise down the line the VAAI may apply.

Here is the VAAI definition which will be applied from now forward:

Threat actors who are motivated by Anarchist or ANTIFA (or a combination of both) ideologies to carry out acts of violence against State, Local, and Federal authorities and infrastructure they believe represent authority or represent political and social ideas they reject.

In close the team continues to do great work which is preventing injury, death, and destruction of property

Brian Murphy
Acting Undersecretary for Intelligence