



September 16, 2020

VIA EMAIL

U.S. Department of Defense
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

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.

On August 14, 2020, the U.S. Department of Health and Human Services (HHS) announced that the U.S. Centers for Disease Control and Prevention had exercised an option in an existing contract with McKesson Corporation to serve as “a central distributor of future COVID-19 vaccines and related supplies needed to administer the pandemic vaccinations.”¹ According to the press release, “McKesson will work under CDC’s guidance to ship COVID-19 vaccines to administration sites.”² This collaboration between CDC and McKesson is in support of Operation Warp Speed, a partnership between HHS and the U.S. Department of Defense (DOD).³

American Oversight seeks records that may shed light on the distribution of any forthcoming COVID-19 vaccine.

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:

¹ Press Release, U.S. Dep’t of Health & Human Servs., Trump Administration Collaborates with McKesson for COVID-19 Vaccine Distribution (Aug. 14, 2020), <https://www.hhs.gov/about/news/2020/08/14/trump-administration-collaborates-mckesson-covid-19-vaccine-distribution.html>.

² *Id.*

³ *Id.*



All orders, commands, directives, instructions, or guidance given to McKesson Specialty Distribution LLC or any of its affiliates, or any employees or representatives thereof, regarding the potential or actual distribution of any COVID-19 vaccine or vaccine-related supplies.

Please provide all responsive records from July 17, 2020, through 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 the federal government's plan for distributing any COVID-19 vaccine.⁵ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including what role McKesson will play in distribution and how distribution decisions will be made. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ Ed Silverman, 'An Uncharted Situation for All of Us': From Shipping Containers to Security Concerns, a Covid-19 Vaccine Supply Chain Takes Shape, STAT, Sept. 8, 2020, <https://www.statnews.com/pharmalot/2020/09/08/covid19-vaccine-supply-chain-cold-chain/>; Tina Reed, How Will COVID-19 Vaccines Be Allocated? AHIP Has Some Questions, Fierce Healthcare (Sept. 8, 2020, 3:22 PM), <https://www.fiercehealthcare.com/payer/how-will-covid-19-vaccines-be-allocated-ahip-has-some-questions>; Elizabeth Weise, 'Mind-Bogglingly Complex': Here's What We Know About How COVID-19 Vaccine Will Be Distributed When It's Approved, USA Today (Sept. 8, 2020, 9:26 AM), <https://www.usatoday.com/story/news/health/2020/09/06/covid-vaccine-complex-distribution-supply-chain-follow-approval/5712053002/>; Selena Simmons-Duffin, States Prepare for Potential Fall Vaccine Distribution Under Pressure from CDC, NPR (Sept. 4, 2020, 4:47 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/04/909655696/states-prepare-for-potential-fall-vaccine-distribution-under-pressure-from-cdc>; Liz Szabo, Health Officials Worry Nation's Not Ready for COVID-19 Vaccine, KHN, Sept. 2, 2020, <https://khn.org/news/health-officials-worry-nations-not-ready-for-covid-19-vaccine/>.

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.⁶ 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.⁷

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.⁸ 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;⁹ posting records and editorial content about the federal government's response to the Coronavirus pandemic;¹⁰ 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;¹¹ the posting of records related to an ethics waiver received by a

⁶ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ American Oversight currently has approximately 15,600 page likes on Facebook and 104,600 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 10, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 10, 2020).

⁸ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁹ *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

¹⁰ 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>.

¹¹ 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;¹² and posting records and analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹³

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.

First, 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 regarding how the administration, working through McKesson, will distribute any COVID-19 vaccine. Recent reporting demonstrates widespread interest in how the federal government will make any COVID-19 vaccine widely available, particularly in light of the expedited timetable it appears to have set for itself.¹⁴ Pressing questions, about which more information is urgently needed, include: (1) who will get access to the vaccine when; (2) how vaccines requiring multiple doses will be effectively distributed and administered; (3) where vaccines will be administered, and; (4) whether the safety and integrity of vaccines will, in fact, be maintained during an accelerated roll-out, particularly when multiple vaccine candidates need to be stored at subzero temperatures.¹⁵

¹² *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>.

¹³ 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>.

¹⁴ See *supra* note 5.

¹⁵ See, e.g., Silverman, *supra* note 5; Weise, *supra* note 5; Simmons-Duffin, *supra* note 5; Angelina Velasquez & Hayley Mason, *CDC Director Asks Kemp to Consider Waiving Requirements for Vaccine Distribution Centers*, CBS46 (updated Sept. 4, 2020), https://www.cbs46.com/news/cdc-director-asks-kemp-to-consider-waiving-requirements-for-vaccine-distribution-centers/article_dee2f052-ed85-11ea-a755-d78cd10bb2e3.html;

American Oversight has requested records with the potential to shed light on these matters, by making public records reflecting any orders or commands given by the federal government to McKesson pursuant to the latter's contract to distribute any COVID-19 vaccine and related supplies. Full transparency regarding the approval and distribution of any COVID-19 vaccine—including through the release of government records on these topics—is particularly necessary right now in light of crumbling public trust around any fast-tracked COVID-19 vaccine.¹⁶

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,¹⁷ 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.”¹⁸ 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

Stephanie Armour, *Trump Administration Asks States to Be Ready for Vaccine by November*, Wall St. J. (Sept. 3, 2020, 1:27 PM), <https://www.wsj.com/articles/trump-administration-asks-states-to-be-ready-for-vaccine-by-november-11599075477>; Sheila Kaplan, et al., *C.D.C. Tells States How to Prepare for Covid-19 Vaccine by Early November*, N.Y. Times, Sept. 2, 2020, <https://www.nytimes.com/2020/09/02/health/covid-19-vaccine-cdc-plans.html>; Szabo, *supra* note 5; Helen Branswell, *U.S. Advisory Group Lays out Detailed Recommendations on How to Prioritize Covid-19 Vaccine*, STAT, Sept. 1, 2020, https://www.statnews.com/2020/09/01/u-s-advisory-group-lays-out-detailed-recommendations-on-how-to-prioritize-covid-19-vaccine/?utm_campaign=breaking_news&utm_medium=email&_hsmi=94368065&_hse_nc=p2ANqtz-8C_m-XWTJqupVHFeHnuPHBXJn0WFC-Nfv-to09OTR7t0hmKzAlI0BooqCm1YUo1bscpstbwdwZC3UoFWU-nWmg_5yS7dyaDn6g_g10U6sAlaCQWnk&utm_content=94368065&utm_source=hs_email; Will Feuer, *CDC Director Says There Will Likely Be a Limited Supply of Coronavirus Vaccines at First*, CNBC (Aug. 28, 2020, 5:31 PM), <https://www.cnbc.com/2020/08/28/cdc-director-says-there-will-likely-be-a-limited-supply-of-coronavirus-vaccines.html>.

¹⁶ Nicholas Florko, *Public Trust in CDC, Fauci, and Other Top Health Officials Is Evaporating*, Poll Finds, STAT, Sept. 10, 2020, <https://www.statnews.com/2020/09/10/trust-cdc-fauci-evaporating/>; Nathaniel Weixel, *Poll: Most American Wouldn't Take a COVID-19 Vaccine Before the Election*, The Hill (Sept. 10, 2020, 2:22 PM), <https://thehill.com/policy/healthcare/515891-poll-most-americans-wont-take-a-covid-vaccine-before-the-election>.

¹⁷ 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).

¹⁸ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

media platforms, such as Facebook and Twitter.¹⁹ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁰

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.
- In conducting your search, please understand the terms "record," in its broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind.
- 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,

¹⁹ See *supra* note 7.

²⁰ 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>.

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.²¹ 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.²²

- 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,²³ 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.

²¹ 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).

²² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²³ 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 Christine H. Monahan at foia@americanoversight.org or 202.869.5244. 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