AMERICAN OVERSIGHT

September 9, 2020

VIA ONLINE PORTAL

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue NW
Washington, DC 20530-0001
Via Online Portal

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 your agency, 28 C.F.R. Part 16, American Oversight makes the following request for records.

In advance of rapidly approaching elections, in which voting by mail is likely to be widespread as a result of the risks posed by the coronavirus pandemic, Attorney General William Barr recently asserted that, "[e]lections that have been held with mail have found substantial fraud and coercion."[1] Attorney General Barr supported this strident assertion by citing a purported example of substantial voter fraud where an individual was supposedly indicted for collecting "1,700 ballots" and "ma[king] them out and vot[ing] for the person he wanted to."[2]

The Attorney General's assertion was false. The case he referenced resulted in an individual pleading guilty to improperly returning a single ballot and resulted in no finding of widespread voter fraud.[3] A Department of Justice (DOJ) spokesperson defended the Attorney General's false assertion by explaining that, "[p]rior to his interview, the Attorney General was provided a memo prepared within the Department that contained an

[1] Matt Zapotosky, *Barr Claims A Man Collected 1,700 Ballots and Filled Them Out As He Pleased. Prosecutors Say That's Not What Happened.*, Wash. Post (Sept. 3, 2020, 7:50 PM), https://www.washingtonpost.com/national-security/barr-claims-a-man-collected-1700-ballots-and-filled-them-out-as-he-pleased-prosecutors-say-thats-not-what-happened/2020/09/03/923aafac-ee2e-11ea-ab4e-581edb849379_story.html.
[2] *Id.*
[3] *Id.*

inaccurate summary about the case which he relied upon when using the case as an example."[4]

Given the Attorney General made statements that sought undermine public confidence in voting by mail on the basis of inaccurate information, American Oversight seeks a record with the potential to shed light on whether and to what extent DOJ documents influenced these potentially harmful statements.

Requested Records

American Oversight requests that the Department of Justice (DOJ) produce the following record within twenty business days:

> A copy of the "memo prepared within the Department that contained an inaccurate summary" [5] of a case of purported voter fraud, which was provided to Attorney General Barr in advance of his September 2, 2020 interview on CNN.
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> Given American Oversight here requests a single, readily-identifiable document American Oversight expects that this request will be assigned to the Simple processing track and that DOJ will respond promptly.
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> Further, American Oversight notes that the elements of this memorandum that are purely factual "summary" cannot be reasonably withheld under the deliberative process privilege. Moreover, to the extent the memorandum does contain a summary of the purported voter fraud case—as DOJ has publicly represented—that summary has already been disclosed by Attorney General Barr in a public interview, so no interest can be served by withholding that information under any FOIA exemption.

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."[6] The public has a

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[4] *Id.*

[5] For further identifying information, please see *supra* note 1.

[6] 5 U.S.C. § 552(a)(4)(A)(iii).

significant interest in the source of inaccurate information used by the nation's chief law enforcement official to undermine public confidence in voting by mail amidst a pandemic that has killed hundreds of thousands of Americans.[7] Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the extent to which Attorney General Barr was misinformed or otherwise used or relied on inaccurate information in a high-profile interview about matters of substantial national importance. 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

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[7] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Updated Sept. 8, 2020, 7:39 AM), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html,

[8] *See* 5 U.S.C. § 552(a)(4)(A)(iii).

[9] American Oversight currently has approximately 15,600 page likes on Facebook and 104,600 followers on Twitter. American Oversight, Facebook, https://www.facebook.com/weareoversight/ (last visited Sept. 8, 2020); American Oversight (@weareoversight), Twitter, https://twitter.com/weareoversight (last visited Sept. 8, 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.

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] 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.[15]

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.
- 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

[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.

[15] *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.[16] 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.[17]

- 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,[18] 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.

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[16] *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).

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

[18] 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 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