



September 23, 2020

**VIA EMAIL**

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**Re: 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 agencies, 45 C.F.R. Part 5, American Oversight makes the following request for records.

In late August 2020, the Centers for Disease Control and Prevention (“CDC”) posted revised guidelines for coronavirus testing advising that individuals without symptoms need not be tested, even after being exposed to someone with the virus.<sup>1</sup> These changes shocked the public as well as public health experts, given the threat of asymptomatic transmission of the virus.<sup>2</sup> Reports over the next several days and weeks have indicated that these changes were made at the direction of top officials in the administration, over

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<sup>1</sup> *Test for Current Infection*, Coronavirus Disease 2019 (COVID-19) (updated Aug. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html#who-should-get-tested>.

<sup>2</sup> See, e.g., Jamie Gumbrecht et al., *Updated CDC Guidelines Now Say People Exposed to Coronavirus May Not Need to Be Tested*, CNN (Aug. 26, 2020, 7:24 PM), <https://www.cnn.com/2020/08/26/health/cdc-guidelines-coronavirus-testing/index.html>; Sheryl Gay Stolberg, *Top U.S. Officials Told to Soften Coronavirus Testing Guidelines*, N.Y. Times, updated Sept. 2, 2020, <https://www.nytimes.com/2020/08/26/us/politics/coronavirus-testing-trump-cdc.html>.



objections from scientists.<sup>3</sup> Additional revisions were released on September 18,<sup>4</sup> and, reportedly, while written by a scientist at CDC, these also were edited by officials at the U.S. Department of Health and Human Services and the White House.<sup>5</sup>

American Oversight seeks records with the potential to shed light on revisions to federal coronavirus testing guidelines, including the process behind those revisions.

### **Requested Records**

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

All talking points or communications guidance created, received, or circulated by your agency regarding:

- a. the revised federal guidelines for testing for the coronavirus published on the CDC website on August 24, 2020, or draft versions of said guidance; or
- b. the revised federal guidelines for testing for the coronavirus published on the CDC website on September 18, 2020, or draft versions of said guidance.

Records responsive to this request including the memorandum circulated within the CDC on or around September 1, 2020, that, reportedly, “instructed employees to say that the C.D.C. was involved in developing the new guidance ‘with suggested comments and edits shared back with HHS and the White

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<sup>3</sup> Apoorva Mandavilli, *C.D.C. Testing Guidance Was Published Against Scientists’ Objections*, N.Y. Times (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/health/coronavirus-testing-cdc.html>; Nick Valencia et al., *CDC Was Pressured ‘From the Top Down’ to Change Coronavirus Testing Guidance, Official Says*, CNN (Aug. 27, 2020, 12:30 AM), <https://www.cnn.com/2020/08/26/politics/cdc-coronavirus-testing-guidance/index.html>; Helen Branswell & Kate Sheridan, *New Covid-19 Testing Guidelines, Crafted at the White House, Alarm Public Health Experts*, STAT, Aug. 26, 2020, <https://www.statnews.com/2020/08/26/new-covid19-testing-guidelines-crafted-at-white-house-alarm-public-health-experts/>; David Lim & Adam Cancryn, *Trump Officials Pressured CDC to Change Virus Testing Guidelines*, Politico (Aug. 26, 2020, 6:39 PM), <https://www.politico.com/news/2020/08/26/brett-giroy-coronavirus-testing-cdc-402524>.

<sup>4</sup> David Lim, *CDC Reverses Course on Testing for Asymptomatic People Who Had Covid-19 Contact*, Politico (Sept. 18, 2020, 2:45 PM), <https://www.politico.com/news/2020/09/18/cdc-reverses-course-on-testing-for-asymptomatic-people-who-had-covid-19-contact-417749>.

<sup>5</sup> Mandavilli, *supra* note 3.

House Taskforce,”<sup>6</sup> and any other instructions or guidance regarding the agency’s public position on this matter.

Please provide all responsive records from August 24, 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.”<sup>7</sup> The public has a significant interest in the federal government’s response to the coronavirus. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the process behind controversial changes to federal testing guidelines.<sup>8</sup> 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>9</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>10</sup>

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

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<sup>6</sup> Mandavilli, *supra* note 3.

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>8</sup> *See supra* notes 2–3.

<sup>9</sup> *See* 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>10</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,400 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 23, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 23, 2020).

to its website.<sup>11</sup> 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;<sup>12</sup> posting records and editorial content about the federal government’s response to the Coronavirus pandemic;<sup>13</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>14</sup> 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>15</sup> and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.<sup>16</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:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the

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<sup>11</sup> See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

<sup>12</sup> *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

<sup>13</sup> 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>.

<sup>14</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>15</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>16</sup> 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>.

request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- 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.<sup>17</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>18</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>19</sup> and many

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<sup>17</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>18</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>19</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>.

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.

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,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Austin R. Evers  
Executive Director  
American Oversight