



September 23, 2020

VIA EMAIL, ONLINE PORTAL, AND FAX

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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 agency, American Oversight makes the following request for records.

In recently released recordings, President Trump told journalist Bob Woodward on February 7, 2020 that the coronavirus “goes through air . . . you just breath the air and that’s how it’s passed. And so, that’s a very tricky one. That’s a very delicate one.”<sup>1</sup> President Trump now maintains that “everybody knew it was airborne” at the time, although the publicly available evidence was spotty and the administration was simultaneously advising Americans that masks were not necessary to prevent or reduce the spread of the disease.<sup>2</sup> Indeed, the CDC did not recommend that the general public wear face masks until early April, nearly two months later.<sup>3</sup>

American Oversight seeks records that may shed light on what the federal government knew regarding airborne transmission of the coronavirus on or before February 7, 2020.

### **Requested Records**

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

All records reflecting whether or to what extent the coronavirus is or could be “airborne,” (i.e., capable of transmission through aerosols (small droplets) that are suspended in the air) that were maintained or created by or otherwise in the possession of your agency on or before February 7, 2020.

The search for responsive records should include all individuals and locations where records are likely to exist, including but not limited to the following:

- U.S. Department of Health and Human Services (HHS)
  - Immediate Office of the Secretary
  - Office of the Deputy Secretary
  - Office of the Chief of Staff
  - Office of the Executive Secretariat

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<sup>1</sup> Jamie Gangel et al., ‘Play It Down’: Trump Admits to Concealing the True Threat of the Coronavirus in New Woodward Book, CNN (Sept. 9, 2020, 8:11 PM), [https://www.cnn.com/2020/09/09/politics/bob-woodward-rage-book-trump-coronavirus/index.html?utm\\_medium=social&utm\\_term=link&utm\\_source=twcnnbrk&utm\\_content=2020-09-09T15%3A58%3A23](https://www.cnn.com/2020/09/09/politics/bob-woodward-rage-book-trump-coronavirus/index.html?utm_medium=social&utm_term=link&utm_source=twcnnbrk&utm_content=2020-09-09T15%3A58%3A23).

<sup>2</sup> Will Feuer, *Trump Says Everyone Knew the Coronavirus Was Airborne in February: It’s ‘No Big Thing,’* CNBC (Sept. 10, 2020, 7:12 PM), <https://www.cnbc.com/2020/09/10/trump-says-everyone-knew-the-coronavirus-was-airborne-in-february-its-no-big-thing.html>.

<sup>3</sup> Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public*, NPR (Apr. 3, 2020), 5:49 PM.

- Office of National Security
- Immediate Office of the Assistant Secretary for Preparedness and Response (ASPR)
- Office of the Chief of Staff of ASPR
- Office of the Director of the Biomedical Advanced Research and Development Authority (BARDA)
- Office of the Chief of Staff of BARDA
  
- Centers for Disease Control and Prevention (CDC)
  - Immediate Office of the Director
  - Office of the Principal Deputy Director
  - Office of the Chief of Staff of CDC
  - Office of the Deputy Director for Infectious Diseases
  - Office of the Director of the National Center for Immunization and Respiratory Diseases
  - Division of Health Informatics and Surveillance (DHIS)
  
- National Institutes of Health
  - Immediate Office of the Director
  - Office of the Chief of Staff
  - Office of the Executive Secretariat
  
- National Institute of Allergy and Infectious Diseases
  - Immediate Office of the Director
  - Office of the Chief of Staff of the Director
  - Office of the Director of the Division of Microbiology and Infectious Diseases
  
- U.S. Department of State
  - Immediate Office of the Secretary of State
  - Office of the Deputy Secretary of State
  - Office of the Executive Secretariat
  - Office of the Under Secretary for Public Diplomacy and Public Affairs
  - Office of the Assistant Secretary for Consular Affairs
  - Office of the Assistant Secretary for Intelligence and Research
  - Office of the Assistant Secretary for East Asian and Pacific Affairs
  - U.S. Embassy in Beijing
  
- Office of the Director of National Intelligence
  - Immediate Office of the Director
  - Office of the Principal Deputy Director
  - Office of the Chief of Staff
  
- U.S. Department of Homeland Security

- Immediate Office of the Secretary
- Office of the Deputy Secretary
- Office of the Chief of Staff
- Office of the Executive Secretary
- Science & Technology Directorate
- Countering Weapons of Mass Destruction Office
  
- Defense Intelligence Agency
  - Immediate Office of the Director
  - Office of the Deputy Director
  - Office of the Chief of Staff
  - Office of the Executive Secretariat
  - Directorate for Science & Technology
  - Asia/Pacific Intelligence Center
  
- Central Intelligence Agency
  - Immediate Office of the Director
  - Office of the Deputy Director
  - Office of the Chief of Staff
  - Office of the Executive Secretariat
  - Directorate of Science and Technology
  - Directorate of Analysis

Please search for all responsive records from November 1, 2019 through February 7, 2020.

### **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>4</sup> The public has a significant interest in knowing how much and in what ways the federal government “downplayed” the threat of the coronavirus.<sup>5</sup> Records with the potential to shed light on this question would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the federal government

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

<sup>5</sup> Gangel, et al., *supra* note 1.

withheld vital information regarding the transmission of the coronavirus from the public. 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>6</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>7</sup>

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

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<sup>6</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>7</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 18, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 18, 2020).

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

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

<sup>10</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>11</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,

senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;<sup>12</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>13</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.
- 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,

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<https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

<sup>12</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>13</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>.

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

## 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,



Melanie Sloan  
Senior Advisor  
American Oversight