



October 3, 2020

**VIA EMAIL**

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U.S. Department of Justice  
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**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.

The president has been hospitalized as a result of his infection with the coronavirus, and numerous high-ranking government officials who have attended recent White House events have also tested positive for coronavirus infection.<sup>1</sup> Other constitutional officers in the line of succession, particularly Vice President Mike Pence and Attorney General William Barr, may also be at risk of infection.<sup>2</sup> These developments create substantial risk that both the president and vice president could become incapacitated, and there is significant public uncertainty over the administration's view of the proper line of presidential succession in light of questions regarding the constitutionality of the Presidential Succession Act of 1947.<sup>3</sup>

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<sup>1</sup> Zeke Miller et al., *Trump, Stricken by COVID-19, Flown to Military Hospital*, AP, Oct. 3, 2020, <https://apnews.com/article/virus-outbreak-donald-trump-elections-melania-trump-michael-pence-f6ba3a16ab9b74b161a3a7211248e97e>; Philip Rucker et al., *Invincibility Punctured by Infection: How the Coronavirus Spread in Trump's White House*, Wash. Post (Oct. 2, 2020, 10:32 PM), [https://www.washingtonpost.com/politics/trump-virus-spread-white-house/2020/10/02/38c5b354-04cc-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/politics/trump-virus-spread-white-house/2020/10/02/38c5b354-04cc-11eb-b7ed-141dd88560ea_story.html).

<sup>2</sup> Washington Post Staff, *Visual Timeline of Trump's Movements Before His Positive Coronavirus Test*, Wash. Post (Oct. 2, 2020, 11:39 PM), <https://www.washingtonpost.com/graphics/2020/politics/trump-contacts-movements-covid/>.

<sup>3</sup> Pete Williams, *Dizzying Scenarios: When Something Happens to the President, Who Takes Charge?*, NBC News (Oct. 2, 2020, Updated at 6:02 PM), <https://www.nbcnews.com/politics/2020-election/dizzying-scenarios-when->



American Oversight seeks records urgently needed to inform the public regarding the government's view of the proper line of presidential succession in case of death or incapacitation of the president and vice president.

### **Requested Records**

American Oversight seeks expedited review of this request for the reasons identified below and requests that the Department of Justice (DOJ) produce the following records as soon as practicable, and at least within twenty business days:

All email communications (including emails, email attachments, calendar invitations, and complete email chains) sent or received by Office of Legal Counsel (OLC) Assistant Attorney General Steven Engel, anyone serving as Principal Deputy Attorney General, or anyone serving as Deputy Assistant Attorney General (including, but not limited to, Henry Whitaker and Liam Hardy), containing any of the following key terms:

- 1) "presidential succession"
- 2) "succession statute"
- 3) "succession clause"
- 4) "act as president"
- 5) "acting president"
- 6) "civil officers of the United States"
- 7) "25th Amendment"
- 8) "Twenty fifth"
- 9) "Twenty-fifth"
- 10) "Speaker of the House"
- 11) "President Pro Temp"
- 12) "President Pro Tempore"
- 13) "3 U.S.C. 19"
- 14) "3 USC 19"
- 15) "3 U.S.C. § 19"

Please provide all responsive records from January 1, 2019, 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

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[something-happens-president-who-takes-charge-n1241844](#); John Yoo, *A Winding Constitutional Path from Trump to Pence to Pompeo*, Wall St. J. (Oct. 2, 2020, 6:31 PM), <https://www.wsj.com/articles/a-winding-constitutional-path-from-trump-to-pence-to-pompeo-11601677891>.

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 OLC’s opinion on the proper line of the presidential succession, a legal question of the most consequential importance. Records with the potential to shed light on this issues would contribute significantly to public understanding of operations of the federal government, including whether there may be a constitutional crisis in case the president and vice president become incapacitated as a result of the extensive coronavirus outbreak that has occurred among high-ranking officials in the Trump administration and Senators who attended events at the White House. 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>5</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>6</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>7</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>8</sup> posting records and editorial content about the federal government’s response to the

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

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

<sup>6</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 Oct. 1, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Oct. 1, 2020).

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

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

Coronavirus pandemic;<sup>9</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>10</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>11</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>12</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and regulations cite, e.g., 28 C.F.R. § 16.5(e)(1)(ii), 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 the view of the proper presidential succession, including the constitutionality of the Presidential Succession Act of 1947, of the office charged with opining on legal questions of great import. The president has been hospitalized following infection with a virus that has killed hundreds of thousands of Americans in recent months, and many high-ranking government officials who have visited the White House have also tested positive for the coronavirus.<sup>13</sup> In this context, the risk that both the president and the

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<sup>9</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., *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>.

<sup>10</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>11</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>12</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>.

<sup>13</sup> Miller et al., *supra* note 1.

vice president could be simultaneously incapacitated has sharply increased. At the same time media outlets and legal experts are raising questions about the constitutionality of the Presidential Succession Act of 1947 and the legally appropriate line of succession if both the president and vice president are incapacitated.<sup>14</sup> The public urgently needs to know the official view of the administration on the legal and constitutional line of presidential succession, and DOJ's OLC is the component that has opined authoritatively on the executive branch view on matters of this sort in the past.

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,<sup>15</sup> 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."<sup>16</sup> 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 media platforms, such as Facebook and Twitter.<sup>17</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>18</sup>

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<sup>14</sup> See Williams, *supra* note 3; Yoo, *supra* note 3.

<sup>15</sup> 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).

<sup>16</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>17</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 Oct. 1, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Oct. 1, 2020).

<sup>18</sup> 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>.

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. For instance, if the 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>19</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

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<sup>19</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).

systems or if officials have, by intent or through negligence, failed to meet their obligations.<sup>20</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>21</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.

## **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

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<sup>20</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>21</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>.

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](mailto:foia@americanoversight.org) 202.897.4213. 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