



November 18, 2020

VIA EMAIL

FOIA Public Liaison
Department of Homeland Security
Office of the Inspector General Counsel
STOP 0305
245 Murray Lane SW
Washington, DC 20528-0305
FOIA.OIG@oig.dhs.gov

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 the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, continues to spread across the United States.¹ There are currently over 11.2 million cases in the U.S. and approximately 246,000 deaths as a result of the virus.² The Federal Emergency Management Agency (FEMA), Customs and Border Patrol (CBP), and Immigration and Customs Enforcement (ICE)—components of DHS—have received criticism for their responses to the coronavirus, including FEMA’s insufficient efforts to provide necessary personal protective equipment (PPE) and other medical supplies³ and ICE’s failure to adequately contain the spread of the coronavirus inside its detention centers.⁴

American Oversight seeks records that shed light on the coronavirus response efforts of DHS components.

¹ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (updated Nov. 16, 2020, 2:45 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

² *Id.*

³ *Congressional Critics Savage US FEMA Chief for Pandemic Response*, Al Jazeera, July 22, 2020, <https://www.aljazeera.com/news/2020/07/congressional-critics-savage-fema-chief-pandemic-response-200722181749316.html>.

⁴ Alisa Reznick, *‘You Can Either Be a Survivor or Die’: COVID-19 Cases Surge in ICE Detention*, NPR (July 1, 2020, 9:17 AM), <https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention>.



Requested Records

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

All records collected or created by the DHS Office of the Inspector General (OIG) in the course of investigations into (1) “FEMA’s Federal Coordination Efforts in Response to COVID-19,” (2) CBP’s and ICE’s ability to manage the COVID-19 pandemic at their Facilities and among their Staff, or (3) “FEMA’s Federal Medical Supply Chain in Response to COVID-19.”⁵ For each investigation, documents requested include but are not limited to:

- Records reflecting any findings or interim factual findings of the investigation
- Records used as evidence during the investigation
- Records memorializing or recording interviews with agency staff, detained persons, state officials, or other individuals

Please provide all responsive records from February 15, 2020, through the date of the search.

American Oversight notes that it is requesting records from investigations that, by their descriptions, involve evaluations and oversight of the effectiveness of agency responses to the coronavirus pandemic and which are not directed at detecting illegal activity for the purpose of enforcing civil or criminal sanctions. Consequently, the requested records should not be withheld or redacted under FOIA Exemption 7 unless DHS OIG can “actually provide evidence that the [investigations are] focused on illegal activity which could result in civil or criminal sanctions.” *Parker v. EOUSA*, 852 F. Supp. 2d 1, 11-12 (D.D.C. Mar. 2012). American Oversight further notes that DHS OIG has already released a report for one of the relevant investigations: Dep’t of Homeland Sec., Office of the Inspector General, *Early Experiences With COVID-19 at ICE Detention Facilities*, June 18, 2020, <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf>. Therefore, even if Exemption 7 could apply to records related to that investigation, Exemption 7(A) likely could not be applied. Furthermore, the absence of recommendations in that report suggest that only a limited amount of the relevant, requested material should be covered by the deliberative process privilege.

⁵ These are the names given by DHS OIG to these investigations. *See* Dep’t of Homeland Sec., Office of the Inspector General, Ongoing Investigations, https://www.oig.dhs.gov/reports/ongoing-projects?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosvitals&stream=top.

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 significant interest in how federal agencies have responded to the coronavirus pandemic. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether the Inspector General of DHS has found evidence of FEMA, CBP, and ICE officials failing to handle the crisis appropriately. 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.⁷ 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.⁸

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.⁹ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related

⁶ 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ *See id.*

⁸ American Oversight currently has approximately 15,600 page likes on Facebook and 106,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Nov. 16, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Nov. 16, 2020).

⁹ *See generally News*, American Oversight, <https://www.americanoversight.org/blog>.

to the Trump Administration’s contacts with Ukraine and analyses of those contacts;¹⁰ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;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 reveal;¹² 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;¹³ and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹⁴

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.

¹⁰ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

¹¹ 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>.

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 *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>.

¹⁴ 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>.

- 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.¹⁵ 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.¹⁶
- 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,¹⁷ 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

¹⁵ 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).

¹⁶ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁷ 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>.

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 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