



January 12, 2021

**VIA EMAIL**

U.S. Department of Defense  
OSD/JS FOIA Requester Service Center  
Office of Freedom of Information  
1155 Defense Pentagon  
Washington, DC 20301-1155  
[whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil](mailto:whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil)

**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.

On January 6, 2021, President Trump incited a mob to attack Congress while members were certifying the election for President-elect Joe Biden.<sup>1</sup> The apparent insurrectionists attacked the Capitol Building, forced their way past reportedly understaffed Capitol Police, and ultimately delayed the Congressional session by forcing lawmakers and their staffs to flee.<sup>2</sup> Four people died during this assault and a fifth person, a Capitol Police officer, died the following day from injuries incurred while engaging with rioters.<sup>3</sup>

While militia members roamed the halls of Congress, Trump reportedly fought against deploying the D.C. National Guard,<sup>4</sup> and the Defense Department reportedly initially

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<sup>1</sup> Press Release, Office of Sen. Mitt Romney, Romney Condemns Insurrection at U.S. Capitol, Jan. 6, 2021, <https://www.romney.senate.gov/romney-condemns-insurrection-us-capitol>.

<sup>2</sup> Rebecca Tan, et al., *Trump Supporters Storm U.S. Capitol, With One Woman Killed and Tear Gas Fired*, Wash. Post (Jan. 7, 2021, 12:30 AM), [https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356_story.html).

<sup>3</sup> Eric Levenson, *What We Know About the 5 Deaths in the Pro-Trump Mob that Stormed the Capitol*, CNN (Jan. 8, 2021, 5:29 PM), <https://www.cnn.com/2021/01/07/us/capitol-mob-deaths/index.html>.

<sup>4</sup> Maggie Haberman (@maggieNYT), Twitter (Jan. 6, 2021, 8:18 PM), <https://twitter.com/maggieNYT/status/1346989618239926273> (“NEW: Trump initially rebuffed and resisted requests to mobilize the National Guard, according to a person with knowledge of the vents. [sic] It required intervention from White House officials to get it done, according to the person with knowledge of the events.”).



denied a deployment request, before later reversing that decision.<sup>5</sup> Congress was only able to certify the win for President-elect Biden later in the evening after law enforcement, including the Capitol Police, and potentially the Federal Bureau for Investigation (FBI), the National Guard, and D.C. Metropolitan Police Department (MPD), reclaimed the Capitol.

This mob of Trump followers, animated by the President, attempted to violently stop the peaceful transfer of power. Now, in this moment of crisis, the public needs to understand the roles that senior officials played during this attack on American democracy.

### **Requested Records**

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

All records reflecting communications (including emails, email attachments, complete email chains, text messages (or messages on similar applications such as Signal or WhatsApp), calendar invitations, and notes from or readouts from phone calls) between (1) the officials listed below, and (2) Vice President Mike Pence or Marc Short, Chief of Staff to Vice President Mike Pence, or anyone communicating on either of their behalf (including, but not limited to, anyone communicating with email addresses ending in ovp.eop.gov).

1. Chris Miller, Acting Secretary of Defense
2. Kash Patel, Chief of Staff to the Acting Secretary of Defense
3. Paul Ney, General Counsel of the Department of Defense

Please provide all responsive records from January 6, 2021.

### **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

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<sup>5</sup> Aaron C. Davis (@byaarondavis), Twitter (Jan. 6, 2021, 2:55 PM), <https://twitter.com/byaarondavis/status/1346908166030766080> ("BREAKING: A source tells me The Defense Department has just denied a request by DC officials to deploy the National Guard to the US Capitol.").

public understanding of operations or activities of the government.”<sup>6</sup> The public has a significant interest in the decision-making process that led to the deployment of troops and law enforcement officers to the nation’s Capitol Building to face insurrectionists—and the delay of said deployment while rioters overtook the Capitol. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including what threats were previously identified and how the federal government had anticipated responding. 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>7</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>8</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>9</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>10</sup> posting records and editorial content about the federal government’s response to the Coronavirus pandemic;<sup>11</sup> posting records received as part of American Oversight’s “Audit the Wall” project to gather and analyze information related to the

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

<sup>7</sup> *See id.*

<sup>8</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,500 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Jan. 11, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Jan. 11, 2020).

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

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

<sup>11</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>.

administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;<sup>12</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>13</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>14</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 your agencies' implementing regulations, 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 actual or alleged government activity. On January 6, a mob of Trump supporters, incited by a speech from President Trump, attacked the Capitol Building to stop the certification of President-elect Joe Biden as president. This raised serious concerns about the security of the Capitol Building, security planning surrounding an important process for American democracy, and the actions or inaction of federal agencies before and during this attack. During the assault, President Trump reportedly fought against deploying the D.C. National Guard,<sup>15</sup> and the Defense Department reportedly initially denied a request, before later reversing that decision.<sup>16</sup> According to *The New York Times*, "Defense and administration officials" told the publication that Vice President Pence, not the Commander in Chief, ultimately ordered deploying the Guard.<sup>17</sup> If true, this raises questions about who is currently in control of the military's armed forces, and

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<sup>12</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>13</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>14</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>15</sup> Haberman, *supra* note 4.

<sup>16</sup> Davis, *supra* note 5.

<sup>17</sup> Helen Cooper, et al., *As the D.C. Police Clear the Capitol Grounds, the Mayor Extends a Public Emergency*, N.Y. Times (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/national-guard-capitol-army.html>.

who was in control during the mob's assault on Congress. Furthermore, the public needs to know whether the president initially denied sending help to protect Congress from the mob that he incited. If true, this has serious implications about the president's commitment to democracy and his willingness to use the military for his own political ends. These records would help answer these questions and also help the public understand what steps security forces took to end the assault.

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about the deployment of the National Guard and other law enforcement and security forces. As noted above, *The New York Times* has reported that the Commander in Chief did not order the National Guard to help Congress, but instead the Vice President gave these orders. The country should not live with ambiguities regarding who is providing orders to the military for any period of time. Further, at this moment of crisis, the public needs transparency about how government officials are responding to the apparent insurrection that trashed the halls of Congress. For stability, the public needs access to the requested records so they can trust that the government is doing what is in its power to ensure a peaceful transition of power. Further, if the president hesitated—or stonewalled efforts—to send forces to protect Congress, as reported, the public needs to know that as soon as possible, because it would imply the president may not be committed to a peaceful transfer of power. In addition, members of Congress are currently drafting and circulating articles of impeachment based on the events of January 6.<sup>18</sup> These records may be relevant to their current deliberations and any future trial.

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>19</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>20</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>21</sup> As discussed

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<sup>18</sup> Ilhan Omar (@IlhanMN), Twitter (Jan. 7, 2021, 12:14 PM), <https://twitter.com/IlhanMN/status/1347230206646509573> (“Articles of Impeachment for introduction, so proud of everyone co-leading this effort with us. We need to move quickly to remove this President from office.”).

<sup>19</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>20</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>21</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,500 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight> (last visited Jan. 11, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Jan. 11, 2021).

previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>22</sup>

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.
- 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>23</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

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<sup>22</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>.

<sup>23</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).

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>24</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>25</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>24</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>25</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) or (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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers  
Executive Director  
American Oversight