



December 22, 2020

**VIA EMAIL**

Brandon Gaylord  
Freedom of Information Officer  
Department of Health and Human Services  
Hubert H. Humphrey Building, Room 729H  
200 Independence Avenue SW  
Washington, DC 20201  
[FOIARequest@hhs.gov](mailto:FOIARequest@hhs.gov)

**Re: Freedom of Information Act Request**

Dear Freedom of Information Act 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 outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both national and international levels.<sup>1</sup> Since February, the virus has spread across the United States, sickening more than 18 million people and causing more than 319,000 deaths.<sup>2</sup> During this time, Assistant Secretary for Health Admiral Brett Giroir has been one of the central players leading the United States' response to this pandemic.

Records previously obtained by American Oversight indicate that Admiral Giroir uses text messaging as a means for communicating regarding agency business. *See Exs. A & B.* American Oversight seeks copies of Admiral Giroir's messages to shed light on the administration's handling of the coronavirus pandemic.

**Requested Records**

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

All text messages (or messages on similar applications such as Signal or WhatsApp) sent or received by Assistant Secretary for Health Admiral Brett Giroir regarding the novel coronavirus outbreak or the government responses to the pandemic.

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<sup>1</sup> *Coronavirus Disease 2019 (COVID-19) Situation Summary*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

<sup>2</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Dec. 22, 2020, 7:56 AM) <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.



Please provide all responsive records from January 3, 2020, through the date of the search.

### **Preservation of Records**

In light of the results of the 2020 presidential election,<sup>3</sup> Admiral Giroir likely has limited continued tenure at the agency as a political appointee of the current administration. Your agency is legally obligated to preserve Admiral Giroir’s text messages and messages on other, similar messaging platforms or applications, such as Signal or WhatsApp, regarding official business—including the federal government’s response to the coronavirus—as federal records under the Federal Records Act (FRA).<sup>4</sup>

American Oversight intends to pursue all legal avenues to enforce its rights to access the records it has requested, including through litigation.<sup>5</sup> Your agency remains on notice that litigation is reasonably foreseeable and should take prompt action to place a preservation hold on relevant records. In light of the special risks presented by the likely imminent departure of Admiral Giroir, your agency should take immediate action to preserve and recover any and all responsive records from Admiral Giroir’s

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<sup>3</sup> Stephen Collinson & Maeve Reston, *Biden Defeats Trump in an Election He Made About Character of the Nation and the President*, CNN (Nov. 7, 2020, 9:44 PM), <https://www.cnn.com/2020/11/07/politics/joe-biden-wins-us-presidential-election/index.html>.

<sup>4</sup> See 44 U.S.C. § 3301 (defining covered records as “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them”); Bulletin 2015-02, Nat’l Archives (July 29, 2015), <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html> (“agencies must capture and manage [text and other electronic messages] in compliance with Federal records management laws, regulations, and policies,” and must “ensure electronic messages are . . . available for release or production when needed”).

<sup>5</sup> Text messages of agency officials like Admiral Giroir are also subject to FOIA. To constitute an “agency record” for purposes of FOIA, an agency, first, must “either create or obtain” a requested record, and, second, “must be in control of the requested materials at the time the FOIA request is made.” *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). There can be no doubt that text messages sent by an agency official are “created” by the agency (and the obvious corollary, that text messages received by that official are “obtained” by the agency). And so long as those text messages relate to agency business, they plainly came into the agency’s possession “in the legitimate conduct of its official duties,” as required to demonstrate that the agency is in control of the material. *Id.*

electronic devices (including any personal devices<sup>6</sup>) before his departure. 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>7</sup>

### **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 or exhibits to those records or other materials enclosed with those records when they were previously transmitted.
- 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>8</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.

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<sup>6</sup> Records of official business conducted using unofficial systems or stored outside of official files are subject to the FRA and FOIA. *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>7</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>8</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>.

- 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.

### **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>9</sup> The public has a significant interest in the federal government's response to the novel coronavirus outbreak. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including what information was known regarding coronavirus cases nationwide and when it was known, and the actions that one of the nation's highest-ranking health officials has taken in response to the pandemic. 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>10</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>11</sup>

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

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

<sup>10</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>11</sup> 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 Dec. 22, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Dec. 22, 2020).

posted to its website.<sup>12</sup> Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include 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> 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> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>15</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>16</sup> and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.<sup>17</sup>

Accordingly, American Oversight qualifies for a fee waiver.

## **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,

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<sup>12</sup> *News*, American Oversight, <https://www.americanoversight.org/blog>.

<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 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> *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>.

<sup>16</sup> *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>.

<sup>17</sup> *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, American Oversight, <https://www.americanoversight.org/sessions-letter>.

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 flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight

# EXHIBIT A

<b>From:</b>	<Brett.Giroir@hhs.gov>
<b>To:</b>	Miller, Katie R. ((b)(6)) </o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8d70f057d51e48b0ac17ad37c7f7e0ba((b)(6))>
<b>Subject:</b>	Re: What's your number
<b>Date:</b>	2020/03/21 16:00:29
<b>Priority:</b>	Normal
<b>Type:</b>	Note

((b)(6))

Also works for texts

Sent from my iPhone

> On Mar 21, 2020, at 3:07 PM, Miller, Katie R. EOP/OVP <((b)(6))> wrote:

>

> ☐

>

> Sent from my iPhone

<b>Sender:</b>	<Brett.Giroir@hhs.gov>
<b>Recipient:</b>	Miller, Katie R. ((b)(6)) </o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8d70f057d51e48b0ac17ad37c7f7e0ba((b)(6))>
<b>Sent Date:</b>	2020/03/21 16:00:29
<b>Message Flags:</b>	Unsent



# **EXHIBIT B**

<b>From:</b>	Giroir, Brett (HHS/OASH) </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A56FCE4755704C4CA031D621B46FD6F7-GIRORI, BRE>
<b>To:</b>	Monroe, Steve (CDC/DDPHSS/OLSS/OD) </o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=89dd524133eb4ac99724fc5456424b0b-Monroe, Ste>; Stenzel, Timothy (FDA/CDRH) </o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cba7ee2d647d476fa35a0fb86a74514c-timothy.ste>
<b>Subject:</b>	Lab Testing
<b>Date:</b>	2020/03/08 10:41:00
<b>Priority:</b>	Normal
<b>Type:</b>	Note

(b)(5)

My mobile is  if you need to chat, or text me to look at anything on email I don't respond to in 30 minutes.

Best wishes  
Brett

**Brett P. Giroir, MD**  
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Assistant Secretary for Health (ASH)  
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Washington, DC 20201  
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