



January 25, 2021

**VIA EMAIL/ONLINE PORTAL**

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Via Online Portal

Valerie H. Yancey  
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Office of the Solicitor General  
Department of Justice  
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Washington, DC 20530-0001  
[OSGFOIA@usdoj.gov](mailto:OSGFOIA@usdoj.gov)

**Re: Expedited 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 the Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

Press reporting indicates that Jeffrey Clark, DOJ's former acting Assistant Attorney General for the Civil Division, worked with then-President Trump to oust acting Attorney General Jeffrey Rosen from his position in the last month of Trump's presidency.<sup>1</sup> Reporting indicates President Trump was unhappy with acting Attorney General Rosen because Rosen refused to file legal briefs supporting Trump allies' lawsuits or an independent action in the Supreme Court. These suits sought to overturn Trump's election loss and appoint special counsels to investigate unfounded claims of election fraud as well as the voting machine firm Dominion Voting Systems.<sup>2</sup>

American Oversight seeks records with the potential to shed light on the actions of top DOJ officials during a time when the president and other officials were taking actions that appear to have been aimed at undermining democratic institutions. These are

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<sup>1</sup> Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

<sup>2</sup> *Id.*



matters of intense and urgent public concern, and the urgency of that concern is heightened by the fast-approaching impeachment trial in the U.S. Senate.<sup>3</sup>

### **Requested Records**

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

The memorandum with talking points regarding the potential for DOJ to bring an action in the Supreme Court or other courts challenging the outcome of the 2020 presidential election. This memorandum was reportedly created by the Solicitor General's office at the request of former Acting Attorney General Rosen.<sup>4</sup>

American Oversight believes your agency is best positioned to determine where responsive records may reside. At a minimum, public information suggests an adequate search should include the Office of the Attorney General, and the Office of the Solicitor General.

Given that this request is limited to a specific, recent, and readily identifiable document, American Oversight expects that this request can be processed on the Simple processing track and result in a prompt agency response.

Please provide all responsive records from December 14, 2020 through January 20, 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>3</sup> Mike DeBonis, *Senate Ends Standoff, Agrees to Start Trump's Impeachment Trial* Feb. 9, Wash. Post (Jan. 22, 2021, 12:36 PM),

[https://www.washingtonpost.com/politics/pelosi-delivers-impeachment-articles-monday/2021/01/22/d858374e-5cd7-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/politics/pelosi-delivers-impeachment-articles-monday/2021/01/22/d858374e-5cd7-11eb-b8bd-ee36b1cd18bf_story.html).

<sup>4</sup> For further identifying information, please see Jess Braven & Sadie Gurman, *Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results*, Wall St. J. (Jan. 23, 2021, 11:07 PM), [https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369?mod=searchresults_pos1&page=1).

public understanding of operations or activities of the government.”<sup>5</sup> The public has a significant interest in a member of DOJ leadership working with the White House to remove the acting Attorney General in an effort to use DOJ resources to further the president’s political interests and to undermine the presidential election. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the communications of top DOJ officials during this time period about potentially relevant matters. 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

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

<sup>6</sup> *See id.*

<sup>7</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Jan. 25, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Jan. 25, 2021).

<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., ‘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>11</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>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.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 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 actual or alleged government activity. Press has reported that acting Assistant Attorney General Jeffrey Clark was coordinating with then-President Trump to remove former Acting Attorney General Jeffrey Rosen from his position because he refused to use the Department of Justice to further President Trump's unfounded claims of election fraud in order to overturn the will of the American people. The requested records would help the public understand what was motivating top DOJ officials during the transition period between President Trump and President Biden's presidencies, which included an attempted insurrection at the U.S. Capitol.<sup>14</sup> Further, the requested records would shed light on whether improper efforts were undertaken by DOJ officials to use the Department's resources to further former President Trump's political interests, including by initiating actions designed to undermine the presidential election.

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<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, <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>.

<sup>14</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).

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 what was happening at DOJ during the transition period. As noted above, the transition period included an insurrection attempt at the U.S. Capitol, which has resulted in impeachment of President Donald Trump, with the House of Representatives set to send the articles of impeachment to the Senate on January 25, 2021.<sup>15</sup> These records may be relevant to the Senate trial, only adding to the public's urgent need for the requested records.

I also certify to be true and correct to the best of my knowledge and belief that there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence. The press is exceptionally interested in these documents, as evidenced by numerous news articles about this matter in widely circulated media outlets.<sup>16</sup> Moreover, I certify to be true and correct to the best of my knowledge and belief that there exist possible questions concerning the government's integrity because of the allegations that the President of the United States sought to remove the acting Attorney General because he refused to further politicize DOJ in order for the President to benefit personally by overturning the results of the election so that he may keep his position.

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>17</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>18</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>19</sup> As discussed

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<sup>15</sup> Mary Clare Jalonick & Lisa Mascaro, *House Sending Trump Impeachment to Senate, GOP Opposes Trial*, AP (Jan. 24, 2021, 1:32 PM), <https://apnews.com/article/capitol-siege-donald-trump-trials-impeachments-trump-impeachment-f4b8bf18ce0e23b877ba945545c3e257>.

<sup>16</sup> See Benner, *supra* note 1; Benner & Edmondson, *supra* note 4; Mary Papenfuss, *Chuck Schumer Calls for Probe into Trump's Alleged Justice Department Coup Attempt*, Huffington Post (Jan. 23, 2021, 9:29 PM), [https://www.huffpost.com/entry/chuck-schumer-trump-jeffrey-clarke-justice-department-investigation\\_n\\_600cc67ec5b6fe97669d09b5](https://www.huffpost.com/entry/chuck-schumer-trump-jeffrey-clarke-justice-department-investigation_n_600cc67ec5b6fe97669d09b5); Anya van Wagtendonk, *Trump Reportedly Considered Putting an Ally Willing to Dispute Election Results in Charge of the DOJ*, Vox (Jan. 23, 2021, 2:25 PM), <https://www.vox.com/2021/1/23/22246026/trump-nyt-report-attorney-general-rosen-clark-election-results>.

<sup>17</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>18</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>19</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 105,200 followers on Twitter. American Oversight, Facebook,

previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>20</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. 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

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<https://www.facebook.com/weareoversight/> (last visited Jan. 25, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Jan. 25, 2021).

<sup>20</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>.

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>21</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>22</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>23</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

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<sup>21</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>22</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>23</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>.

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](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,

*/s/ Dan McGrath*  
Dan McGrath  
on behalf of  
American Oversight