



March 30, 2021

VIA EMAIL/FOIA ONLINE/ONLINE PORTAL/FOIA.GOV

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Re: 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 your agency, American Oversight makes the following request for records.

Under the Federal Records Act and its implementing regulations, including those promulgated by the National Archives and Records Administration (NARA), federal agencies have the responsibility to create record schedules that include a description of each type or series of records maintained or created by senior officials.¹ Before leaving their positions, senior officials must identify their records and a records custodian to manage the proper lifecycle of these records, including appropriately retiring and archiving records permanently.² American Oversight seeks records related to these archival inventories created by departing officials of the Trump Administration.

Requested Records

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

Any inventory or other records accounting for and detailing the federal records archived by the officials below. These records should include archive inventories of paper and electronic records, including emails, texts, and other methods of communication.

Department of Defense

1. Chris Miller, Acting Secretary of Defense
2. Ezra Cohen-Watnick, Acting Under Secretary of Defense for Intelligence and Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict
3. Kash Patel, Chief of Staff to Acting Secretary Miller
4. Joshua Whitehouse, White House Liaison
5. Anthony Tata, Senior Official Performing the Duties of Under Secretary of Defense for Policy
6. Douglas Macgregor, Senior Advisor to Secretary Miller

Office of the Director of National Intelligence

1. John Ratcliffe, Director of National Intelligence
2. Dustin Carmack, Chief of Staff to the Director of National Intelligence

¹ Jeremy Gordon, *What Rules Apply to Government Records During a Presidential Transition?*, Lawfare (Dec. 9, 2020, 10:22 AM), <https://www.lawfareblog.com/what-rules-apply-government-records-during-presidential-transition>.

² See e.g., *Senior Officials' Records Management Responsibilities*, Patrick F. Kennedy (Aug. 28, 2014) at 2, <https://www.archives.gov/files/press/press-releases/2015/pdf/attachment1-memo-to-department-leadership.pdf>.

Department of Justice

1. William Barr, Attorney General
2. Jeffrey Rosen, Acting Attorney General and Deputy Attorney General
3. Richard Donoghue, Acting Deputy Attorney General
4. Jeffrey Clark, Acting Assistant Attorney General for the Civil Division and Assistant Attorney General for the Environment and Natural Resources Division
5. Brian Rabbitt, Acting Assistant Attorney General for the Criminal Division
6. Gene Hamilton, Counselor to the Attorney General

Department of State

1. Mike Pompeo, Secretary of State
2. Stephen Biegun, Deputy Secretary of State
3. T. Ulrich Brechbuhl, Counselor
4. Brian Bulatao, Under Secretary for Management

Department of Homeland Security

1. Chad Wolf, Acting Secretary of Homeland Security
2. Peter Gaynor, Acting Secretary of Homeland Security
3. Ken Cuccinelli, Acting Deputy Secretary of Homeland Security
4. Chad Mizelle, Acting General Counsel

Department of Health and Human Services

1. Alex Azar, Secretary of Health and Human Services
2. Eric Hargan, Deputy Secretary of Health and Human Services

Department of Education

1. Betsy DeVos, Secretary of Education
2. Mick Zais, Acting Secretary of Education and Deputy Secretary of Education

Environmental Protection Agency

1. Andrew Wheeler, Environmental Protection Agency Administrator
2. Henry Darwin, Acting Deputy Environmental Protection Agency Administrator

Department of the Interior

1. David Bernhardt, Secretary of the Interior
2. Katherine MacGregor, Deputy Secretary of the Interior

Department of Agriculture

1. Sonny Perdue, Secretary of Agriculture
2. Stephen Censky, Deputy Secretary of Agriculture

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

Please provide all responsive records from January 1, 2020, through the date the search is conducted.

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."³ The public has a significant interest in the records deemed to be public or private by senior officials leaving the Trump administration. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including what types or series of records are being archived after the Trump Administration. 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.⁴ 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.⁵

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

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ *See id.*

⁵ American Oversight currently has approximately 15,700 page likes on Facebook and 106,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Mar. 22, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Mar. 22, 2021).

to its website.⁶ 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;⁷ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;⁸ 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;⁹ 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;¹⁰ and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹¹

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:

⁶ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁷ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁸ 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>.

⁹ 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>.

¹⁰ *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>.

¹¹ 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>.

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- 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.¹² 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.¹³
- 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,¹⁴ and many agencies have adopted the 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

¹² 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).

¹³ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁴ 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>.

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,

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