



September 23, 2021

VIA EMAIL

Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756-3199
openrecords@dshs.texas.gov

Re: Public Information Request

Dear Public Information Officer:

Pursuant to the Texas Public Information Act, as codified at Tex. Code ch. 552, American Oversight makes the following request for public records.

In July and August 2021, Texas experienced a surge of new COVID-19 cases as the Delta variant became the dominant strain of the virus.¹ During this time, Governor Greg Abbott banned local mask and vaccine mandates, leading to several court challenges.² Governor Abbott also directed the Texas Department of State Health Services (DSHS) to use staffing agencies to find medical staff from neighboring states to help overwhelmed staff in Texas medical facilities.³ He also directed the DSHS and the Department of Emergency Management (TDEM) to open antibody infusion centers throughout Texas to help slow the spread of the variant.⁴

American Oversight seeks records with the potential to shed light on top officials' handling of the Delta variant surge in Texas.

Requested Records

American Oversight requests that your office promptly produce the following:

¹ Elvia Limón, *What You Need to Know About the Latest COVID-19 Surge and How to Stay Safe*, Texas Trib. (July 26, 2021, 5:00 AM), <https://www.texastribune.org/2021/07/26/texas-covid-19-delta/>.

² Dave Montgomery, *Gov. Greg Abbott Bars Mandates for Vaccinations and Masks in Texas*, N.Y. Times, Aug. 14, 2021, <https://www.nytimes.com/2021/07/31/world/greg-abbott-mask-vaccine-mandate.html>.

³ Terry Wallace, *Texas Gov. Abbott Seeks Out-of-State Help Against COVID-19*, AP, Aug. 10, 2021, <https://apnews.com/article/business-health-education-coronavirus-pandemic-368eb9eb57b1d3b1a473d4414c42a522>.

⁴ Karen Brooks Harper, *Desperate Texas Doctors Turn to Antibody Treatments to Slow Down Surging COVID-19 Hospitalizations*, Texas Tribune (Aug. 23, 2021, 4:00 AM), <https://www.texastribune.org/2021/08/23/coronavirus-texas-antibody-treatment-regeneron-doctors/>.



All email communications (including emails, email attachments, complete email chains, and calendar invitations) sent by the officials listed below containing any of the key terms specified below.

DSHS Officials:

1. Commissioner John Hellerstedt
2. Senior Advisor Barbara Klein
3. Deputy Commissioner Kirk Cole
4. Chief of Staff Ricky Garcia
5. Chief State Epidemiologist Jennifer Shuford, MD, MPH

Key Terms:

1. Mask*
2. Hospitalization
3. Hospitalizations
4. Vaccin*
5. Pfizer
6. Moderna
7. J&J
8. "J & J"
9. "Johnson and Johnson"
10. "Johnson & Johnson"
11. Antibody
12. Antibodies
13. Regeneron
14. Monoclonal
15. Delta
16. Infusion
17. AmerisourceBergen

Please note that American Oversight is using the asterisk (*) to designate the standard use of "wildcards" in the search for responsive records. For example, a search for "Vaccin*" would return all of the following: vaccines, vaccines, vaccination, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

In an effort to accommodate your office and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by the listed officials. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. This means, for example, that both a listed official's response to an email containing a specified term and the initial received message are responsive to this request and should be produced.

Please provide all responsive records from July 28, 2021 through September 2, 2021.

In addition, American Oversight insists that your office use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; governmental authorities may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Please search all records regarding official business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Emails conducting government business sent or received on the personal account of a governmental authority's officer or employee constitutes a record for purposes of the Texas Public Information Act.⁵

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 it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. If a request is denied in whole, please state specifically that 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 your office 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.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, 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 office can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF 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.

⁵ Tex. Code § 552.002(a-2); *see also Adkisson v. Paxton*, 459 S.W.3d 761, 773 (Tex. App. 2015).

Fee Waiver Request

In accordance with Tex. Code § 552.267(a), American Oversight requests a waiver of fees associated with processing this request for records, because such a waiver “is in the public interest because providing the copy of the information primarily benefits the general public.” The requested records are directly related to the work of state officials, with the potential to shed light on how top officials are managing a surge of COVID-19 cases. This matter is a subject of substantial public interest in Texas.⁶ Accordingly, release of records that may help the public understand the operations and activities of states officials is in the public interest.

Release of the requested records will primarily benefit the public.⁷ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the requested records is not in American Oversight’s financial interest, but is rather in the public interest. American Oversight is committed to transparency and makes the responses governmental authorities provide to public records requests publicly available. As noted, the subject of this request is a matter of public interest, and the public would benefit from an enhanced understanding of the government’s activities through American Oversight’s analysis and publication of these records. 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 numerous 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 to the organization’s investigations into misconduct and corruption in state governments;¹⁰ the posting of records related to the Trump Administration’s contacts with Ukraine and analyses of those contacts;¹¹ posting records and editorial content

⁶ See e.g., Limón, *supra* note 1, Montgomery *supra* note 2, Wallace *supra* note 3, Harper, *supra* note 4.

⁷ Tex. Code § 552.267(a).

⁸ American Oversight currently has approximately 15,700 followers on Facebook and 108,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sep. 10, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sep. 10, 2021).

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

¹⁰ *State Investigations*, American Oversight, <https://www.americanoversight.org/states>.

¹¹ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

about the federal government's response to the Coronavirus pandemic;¹² 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;¹³ 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;¹⁴ and posting records and analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹⁵

Accordingly, American Oversight qualifies for a fee waiver. If your office denies our request for a fee waiver, please notify American Oversight of any anticipated fees or costs in excess of \$40 prior to incurring such costs or fees.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your county on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Emma Lewis at records@americanoversight.org or (202) 919-6303. Also, if American Oversight's

¹² 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>.

¹³ 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>.

¹⁴ *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>.

¹⁵ 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>.

request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

/s/ Emma Lewis

Emma Lewis
on behalf of
American Oversight