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VIA ONLINE PORTAL & EMAIL

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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 the Department of Justice, 28 C.F.R. Part 16, American Oversight makes the following request for records.



On January 6, 2021, then-President Trump incited a mob to attack Congress while they were certifying the election for then-President-elect Joe Biden.¹ The insurrectionists attacked the Capitol, forced their way past understaffed Capitol Police, and ultimately delayed the Congressional session as the mob forced lawmakers and their staffs to flee.² During this assault, five people died.³

While militia members roamed Congressional halls, Trump reportedly fought against deploying the D.C. National Guard,⁴ and the Defense Department reportedly initially denied a request, before later reversing the decision.⁵ Congress was able to certify the win for now-President Joe Biden only later in the evening after Capitol Police, the Federal Bureau of Investigation (FBI), the National Guard, Metropolitan Police Department (MPD), and other law enforcement officials reclaimed the Capitol.⁶

American Oversight seeks records reflecting the roles that senior officials played during this attack on American democracy and the peaceful transfer of power.

Requested Records

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

All email communications (including emails, email attachments, complete email chains, and calendar invitations) and text messages or messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, Twitter

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

² 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.

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

⁴ 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 [e]vents. It required intervention from White House officials to get it done, according to the person with knowledge of the events.”).

⁵ Aaron C. Davis (@byaaroncdavis), Twitter (Jan. 6, 2021, 2:55 PM), <https://twitter.com/byaaroncdavis/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.”).

⁶ Kristina Peterson & Siobhan Hughes, *Congress Reconvenes to Finish Certifying Biden’s Electoral College Win*, Wall St. J. (Jan. 7, 2021, 12:55AM), <https://www.wsj.com/articles/congress-aims-to-resume-certifying-bidens-electoral-college-win-11609977260>.

direct messages, Facebook messages, WhatsApp, Signal, Telegram, or Parler) sent or received between January 4 and January 7, 2021, by the former agency officials listed below:

1. Counselor to the Attorney General Gene Hamilton
2. Acting Solicitor General Jeffrey Wall
3. Assistant to the Solicitor General Christopher Michel
4. Acting U.S. Attorney for the District of Columbia Michael Sherwin
5. United States Attorney for the District of Connecticut John Durham
6. Acting Director of Public Affairs & Senior Advisor for National Security Communications Marc Raimondi
7. Anyone serving in the role of Acting Chief of the Counterterrorism Department at the National Security Division

Please note that American Oversight does not seek, and that this request specifically excludes, the initial mailing of news clips or other mass-distribution emails. However, subsequent communications forwarding such emails are responsive to this request. In other words, for example, if a specified official received a mass-distribution news clip email during this time period, that initial email would not be responsive to this request. However, if the specified officials forwarded that email to another individual with his own commentary, that subsequent message would be responsive to this request and should be produced.

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."⁷ The public has a significant interest in communications of officials in the lead up to and during the January 6th insurrection attempt on the U.S. 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 communications these officials were having during the time of the insurrection. 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.

⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

This request is primarily and fundamentally for non-commercial purposes.⁸ 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.⁹

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.¹⁰ 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;¹¹ posting records and editorial content 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

⁸ Anthony Salvanto et al, *CBS News Poll: Still More to Learn About January 6, Most Americans Say*, CBS News (July 20, 2021, 5:00 PM), <https://www.cbsnews.com/news/january-6-opinion-poll/>.

⁹ American Oversight currently has approximately 15,600 page likes on Facebook and 109,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Nov. 22, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Nov. 22, 2021).

¹⁰ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

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

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>.

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.

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.
- 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.¹⁶ 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

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>.

¹⁶ 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).

systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁷

- 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,¹⁸ 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

¹⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁸ 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>.

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 Emma Lewis at foia@americanoversight.org or (202) 919-6303. 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/ Emma Lewis
Emma Lewis
on behalf of
American Oversight