



December 17, 2021

VIA EMAIL

Amanda Joiner, Associate Counsel
U.S. Election Assistance Commission
633 3rd Street NW, Suite 200
Washington DC 20001
ajoiner@eac.gov

Re: Freedom of Information Act Request

Dear Associate Counsel Joiner:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 11 C.F.R. Part 9405, American Oversight makes the following request for records.

In November 2021, public reporting revealed that Cleta Mitchell, a longtime election integrity activist who supported former President Trump's false claim that he won the 2020 presidential election, had been appointed to the U.S. Election Assistance Commission's Board of Advisors by the U.S. Commission on Civil Rights.¹ In response to press inquiries, all four EAC commissioners provided a statement asserting that it would be inappropriate for the commissioners to speak out again any appointee. American Oversight seeks records to shed light on the evaluation of Mitchell's candidacy to serve on the EAC's Board of Advisors.

Requested Records

American Oversight requests that the U.S. Election Assistance Commission produce the following records within twenty business days:

1. All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) and all text message threads/conversations between (a) the U.S. Election Assistance Commission commissioners listed below, and (b) Cleta Mitchell (including, but not limited to, at cleta@cletamitchell.com and cmitchell@foley.com).

U.S. Election Assistance Commission Commissioners:

- i. Donald Palmer, Chair

¹ Jessica Huseman, *How Trump Ally Cleta Mitchell Won a Seat on the EAC Advisory Board*, Votebeat (Nov. 19, 2021, 5:08 PM), <https://www.votebeat.org/2021/11/19/22792170/cleta-mitchell-eac-advisory-board-j-christian-adams-commission-civil-rights>.



- ii. Thomas Hicks, Vice Chair
 - iii. Christy McCormick
 - iv. Benjamin Hovland
2. All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) and all text message threads/conversations sent or received by any of the U.S. Election Assistance Commission commissioners listed above containing any of the search terms listed below.

Search Terms:

- i. Cleta
- ii. “Conservative Partnership”
- iii. CPI
- iv. “Public Interest Legal”
- v. PILF
- vi. FreedomWorks
- vii. “Freedom Works”
- viii. USCCR
- ix. “Commission on Civil Rights”
- x. “Civil Rights Commission”

For the email portion of request item 2, 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 Commissioner Palmer received a mass-distribution news clip email referencing PILF, that initial email would not be responsive to this request. However, if Commissioner Palmer forwarded that email to another individual with their own commentary, that subsequent message would be responsive to this request and should be produced.

For the text message portion of request item 2, American Oversight requests that full text message threads/conversations be produced. For example, if Commissioner Palmer sent or received a text message referencing PILF, the complete thread/conversation spanning two days (48 hours) prior to the sending or receipt of the message through two days (48 hours) following the sending or receipt of the message should be produced, and not just the message containing the key term.

For request items 1 & 2, please provide all responsive records from November 1, 2020, through the date the search is conducted.

3. All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) concerning government business sent by EAC Board of Advisors member Cleta Mitchell to any email address ending in .com, .net, .org, .mail, .edu, .law, .co, or .us.

For request item 3, 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 emails request to emails sent by Board of Advisors member Cleta Mitchell. 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 an email response sent by Mitchell to an email address ending in .com and the initial received message are responsive to this request and should be produced.

4. All text message threads/conversations concerning government business sent or received by EAC Board of Advisors member Cleta Mitchell.

For request items 3 & 4, please provide all responsive records from November 1, 2021, through the date the search is conducted.

5. Records sufficient to identify any ethics waivers or authorizations, recusal determinations, or conflict determinations or analyses, for Cleta Mitchell.
6. All records containing objections, dissent, or concerns over the appointment of Cleta Mitchell to the EAC Board of Advisors created by or provided to any EAC Commissioner, any EAC Board of Advisors member, or any EAC staff member. This includes any memoranda, email communications, text message communications, or records reflecting any conversations containing any objections, dissent, or concerns over Cleta Mitchell's appointment.

For request items 5 & 6, please provide all responsive records from January 1, 2021, 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."² The public has a significant interest in the growing politicization of the U.S. Election Assistance Commission.³ Records with the potential to shed light on this matter would contribute

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, ProPublica (July 22, 2020, 5AM EDT),

significantly to public understanding of operations of the federal government, including whether and to what extent EAC commissioners maintained concerns regarding Board of Advisors member Clela Mitchell's partisan background. 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 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

<https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight>.

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ American Oversight currently has approximately 16,200 page followers on Facebook and 109,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Dec. 15, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Dec. 15, 2021).

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,

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:

- 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 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

<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>.

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.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 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

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 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