



March 8, 2022

VIA EMAIL

Christopher J. Mincher
Office of the Governor
State House
100 State Circle
Annapolis, MD 21401
christopher.mincher@maryland.gov

Re: Public Information Act Request

Dear Records Custodian:

Pursuant to the Maryland Public Information Act (“PIA”) codified at Md. Code Ann., Gen. Prov. §§ 4-101 *et seq.*, American Oversight makes the following request for records.

On December 30, 2021, the Washington Post reported that the Office of Maryland Governor Larry Hogan has conducted official business using Wickr, a messaging application.¹ A Wickr user may set the application to either delete messages after a set period (using an “Expiration Timer”) or to delete messages after the recipient reads them (using a “Burn-on-Read Timer”).²

According to reporting, state officials have used Wickr to discuss Maryland’s response to the COVID-19 pandemic, including attempts to procure tests from South Korea when test availability was otherwise limited.³

American Oversight seeks records to better understand the Office of the Governor’s response to the pandemic and the Office’s policies and procedures to store and preserve Wickr messages that relate to government business.

¹ Steve Thompson, *Md. Gov. Larry Hogan’s Messages to State Employees Self-Destruct in 24 Hours*, Wash. Post (Dec. 30, 2021, 9:00 AM), <https://www.washingtonpost.com/dc-md-va/2021/12/30/hogan-wickr-messages-disappear>

² See, e.g., Wickr Support, “Auto-Destruction: Expiration and Burn-on-read (BOR)”, 2021, <https://support.wickr.com/hc/en-us/articles/115007397548-Auto-Destruction-Expiration-and-Burn-on-read-BOR-> (last accessed Feb. 2, 2022); see also Wickr Support, “How Do I Adjust Message Destruct Times?”, Jan. 2022, <https://support.wickr.com/hc/en-us/articles/115001319234-How-do-I-adjust-message-destruct-times-> (last accessed Feb. 2, 2022).

³ See Thompson, *supra* note 1.



Requested Records

American Oversight requests that the Office of the Governor produce the following records immediately or within a reasonable period upon approval, and in no more than thirty days after receipt of this request:⁴

1. Any final legal analysis written or obtained by your agency regarding the use of the messaging application Wickr, or other messaging applications that automatically delete messages after a set amount of time.
2. Any records reflecting any policy or guidance regarding any messaging applications that may or may not be used to coordinate or conduct official business.
3. Any records reflecting any protocol, guidance, policy, or practice to preserve messages from the messaging application Wickr or other messaging applications, including those that automatically delete messages after a set amount of time.

For all parts of this request, please provide all responsive records from January 1, 2018, through the date the search is conducted.

Fee Waiver Request

In accordance with Md. Code Ann., Gen. Prov. § 4-206(e), American Oversight requests a waiver of fees associated with processing this request for records. A fee waiver is in the public interest because disclosure of the requested records will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Because American Oversight is a 501(c)(3) nonprofit dedicated to government transparency, and the request is primarily and fundamentally for non-commercial purposes, a fee waiver will serve the public interest by furthering American Oversight's nonprofit mission to inform and educate the public through the release of public records.

A waiver of fees is "in the public interest,"⁵ because disclosure of the requested records will inform the public concerning government activities and operations of interest. The public has a significant interest in the actions taken by Maryland's Office of the Governor during the coronavirus pandemic, especially those taken on communication applications with settings that automatically delete messages after a set amount of time. These applications risk destroying government records critical to transparency and oversight of the governor's office. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the government, including helping the public understand the decisions taken by the Maryland Governor's office to confront the pandemic.

⁴ Md. Code Ann., Gen. Prov. §§ 4-203(a)(1)-(b)(1).

⁵ Md. Code Ann., Gen. Prov. § 4-206(e)(2)(ii).

American Oversight is committed to transparency and makes the responses agencies provide to public records 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. 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.⁶

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.⁷ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records and analysis related to the organization's investigations into misconduct and corruption in state governments;⁸ posting records and analysis of federal and state governments' responses to the Coronavirus pandemic;⁹ posting records received as part of American

⁶ American Oversight currently has approximately 15,700 page likes on Facebook and 117,800 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Mar. 7, 2022); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Mar. 7, 2022).

⁷ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁸ See generally *State Investigations*, American Oversight, <https://www.americanoversight.org/states>; see, e.g., *State Government Contacts with Voting-Restriction Activists*, American Oversight, <https://www.americanoversight.org/investigation/state-government-contacts-with-voting-restriction-activists>; *Georgia's Voting Machines and Election Security*, American Oversight, <https://www.americanoversight.org/investigation/georgias-voting-machines-and-election-security>.

⁹ See, e.g., *The Trump Administration's Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; *Tulsa Health Officials Initially Estimated Trump Rally Would Directly Lead to 2 to 9 Deaths*, American Oversight, <https://www.americanoversight.org/tulsa-health-officials-initially-estimated-trump-rally-would-directly-lead-to-2-to-9-deaths>; *Wisconsin Documents Offer Window into Early Uncertainty over COVID-19*, American Oversight, <https://www.americanoversight.org/wisconsin-documents-offer-window-into-early-uncertainty-over-covid-19>; *In the Documents: Florida Health Department Efforts to Suppress Release of Coronavirus Records*, American Oversight, <https://www.americanoversight.org/in-the-documents-florida-health-department-efforts-to-suppress-release-of-coronavirus-records>.

Oversight’s “Audit the Wall” project to gather and analyze information related to the Trump administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁰ and 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.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:

- 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 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

¹⁰ 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>.

¹¹ *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>.

conducted using unofficial systems or stored outside of official files are subject to the PIA.¹²

- 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.¹³ 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 Khahilia Shaw at records@americanoversight.org or (202) 539-6507. Also, if American Oversight's

¹² See Md. Public Information Act Manual 1-6 (15th ed., Nov. 2020) (“email communications from private email accounts and text messages stored on private devices [that] are made or received by a custodian in connection with the transaction of public business, they are public records.”).

¹³ Md. Code Ann., Gen. Prov. § 4-203(c)(1)(ii); *Blythe v. State*, 161 Md. App. 492, 519, cert. granted, 388 Md. 97 (2005).

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

Sincerely,

/s/ Khahilia Shaw

Khahilia Shaw

On behalf of

American Oversight