AMERICAN OVERSIGHT

July 19, 2019

VIA ONLINE PORTAL

Freedom of Information Act Office
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10139
Washington, DC 20410-3000
Via Online Portal

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

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

The White House has recently taken the extraordinary step of announcing that it would refuse to comply with any oversight requests from the legislative branch. In a letter to the House Judiciary Chairman, White House Counsel Pat Cipollone called congressional investigations an effort to "harass" President Donald Trump, and stated that current and former administration officials would not be permitted to testify before Congress.[1] This letter followed months of executive branch agencies refusing to comply with congressional requests for documents and the president's extraordinary statement that his administration is "fighting all the subpoenas."[2]

American Oversight seeks records with the potential to shed light on the White House's unprecedented stance, and whether the White House is directing executive branch agencies to refuse to comply with congressional requests.

Requested Records

> *(NOTE: American Oversight submitted a very similar request to your agency in a letter dated June 24, 2019. This request varies from that request only in that it identifies different White House officials with whom the request seeks records reflecting communications. Any search accommodations American Oversight has agreed to with respect to the June 24, 2019 request may also be applied to this request.)*

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

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[1] Letter from White House Counsel Pat Cipollone to House Judiciary Chairman Jerrold Nadler, May 15, 2019, https://www.lawfareblog.com/document-white-house-letter-judiciary-committee-regarding-obstruction-justice.

[2] Jeremy Diamond & Allie Malloy, *Trump at War with Democrats: 'We're Fighting All the Subpoenas,'* CNN (Apr. 24, 2019, 3:40 PM), https://www.cnn.com/2019/04/24/politics/donald-trump-fight-subpoenas-don-mcgahn-ridiculous/index.html.

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, handwritten or electronic summaries of any oral communications, or other materials) between (a) political appointees* in the Department of Housing and Urban Development (HUD) Office of Congressional and Intergovernmental Relations, Office of General Counsel, or HUD Leadership Offices and (b) any of the White House Counsel staff listed below regarding congressional oversight of the executive branch—including both specific congressional oversight of specific matters and general policies, concerns, and considerations related to congressional oversight of the executive branch.

1) Brittany Biles
2) Richard Cleary
3) John Coghlan
4) Christopher Cook
5) Melissa Croslow
6) Elizabeth Gorman
7) Chase Harrington
8) Elizabeth Horning
9) Mark Lytle
10) Coreen Mao
11) Austin Mayron
12) Brian Miller
13) Michael Purpura
14) Brian Rabbitt
15) Mackenzie Siebert
16) Jeffrey Freeland**

*"Political appointee" should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

**Mr. Freeland is an official in the Legislative Affairs office of the White House rather than the White House Counsel's office.

Please provide all responsive records from September 1, 2018, through the date of the search.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. 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 includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.[3] **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, through negligence or willfulness, failed to meet their obligations.**[4]

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency's prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**[5] **Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files.** For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption"

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[3] *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).

[4] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

[5] 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.

or "disclosure is prohibited by law."[6] If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."[7] Moreover, the *Vaughn* index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."[8] Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"[9] 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.[10] Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, you are on notice that litigation is reasonably foreseeable.

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 hopes to 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.

Fee Waiver Request

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[6] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).
[7] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
[8] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).
[9] *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).
[10] *Mead Data Central*, 566 F.2d at 261.

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's implementing 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 public understanding of those operations. 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 likely to contribute significantly to public understanding of activities of the government. There is significant public interest in understanding the degree to which the White House is directing agencies to refuse to cooperate with congressional oversight. Congress' primary role is to represent the American people. By refusing to cooperate with congressional oversight, the executive branch is drastically changing the inter-workings of the U.S. government in a manner that the American public should be informed of. American Oversight has the capacity to disseminate the requested information as it posts all records to its public websites and publishes analyses of its records. In the past, the organization has successfully informed the public of specific government activities and operations – including on issues of executive branch interactions with congressional oversight.[11] And, as described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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.[12] American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,[13] American Oversight promptly posted the records to its website and published an analysis of what the records

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[11] *See, e.g.,* Kathryn Watson, *The Subpoena War Between the White House and Capitol Hill Is Only Getting Started*, CBS NEWS, May 9, 2019, https://www.cbsnews.com/news/subpoenas-trump-officials-white-house-called-to-testify-congress/; Lauren Fox, Manu Raju & Jeremy Herb, *Democrats Look to Courts as White House Stonewalls on Subpoenas*, CNN, Apr. 25, 2019, https://www.cnn.com/2019/04/24/politics/democrats-courts-white-house-subpoenas/index.html.

[12] American Oversight currently has approximately 12,200 page likes on Facebook and 54,000 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited May 16, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited May 16, 2019).

[13] *DOJ Records Relating to Solicitor General Noel Francisco's Recusal,* AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.

reflected about DOJ's process for ethics waivers.[14] As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.[15]

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

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, have any questions, or foresee any problems in fully releasing the requested records, 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,

Austin R. Evers
Executive Director
American Oversight

[14] *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] *Audit the Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall.