



January 29, 2020

VIA EMAIL

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Agency
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Re: Freedom of Information Act Request

Dear FOIA Officer:

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

The Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCMRs) are responsible for hearing veterans' appeals of less-than-honorable discharges. In recent years, there has been considerable outcry on behalf of veterans who received less-than-honorable discharges because they were not properly screened for Post Traumatic Stress Disorder and other combat injuries,¹ suffered from sexual assault while serving,² or were discharged because of their sexuality.³ DOD is legally obligated to publish BCMRs⁴ and DRBs⁵ past decisions online, allowing veterans and their advocates

¹ *DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations*, GOVERNMENT ACCOUNTABILITY OFFICE (May 16, 2017), <https://www.gao.gov/products/GAO-17-260>; Dave Phillips, *Veterans Want Past Discharges to Recognize Post-Traumatic Stress*, N.Y. TIMES, Feb. 19, 2016, <https://www.nytimes.com/2016/02/20/us/veterans-seek-greater-emphasis-on-ptsd-in-bids-to-upgrade-discharges.html>.

² Quil Lawrence, *More Vets Who Are Coping with PTSD from Sexual Assaults Get Honorable Discharges*, NPR (June 1, 2018, 10:44 PM), <https://www.npr.org/sections/thetwo-way/2018/06/01/616259732/more-vets-coping-with-ptsd-after-sexual-assaults-get-honorable-discharges>.

³ Dave Phillips, *Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges*, N.Y. TIMES, Sept. 6, 2015, <https://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html>.

⁴ 10 U.S.C. § 1552.

⁵ 32 C.F.R. § 70.8; Department of Defense Directive 1332.41.



to better fight unjust discharges. Before April 2019, DOD published a limited number of past decisions. In April 2019, the agency removed all decisions from its websites without explanation.⁶ Responding to a lawsuit over its removal of the records, DOD has since announced that it will restore past decisions to its websites.⁷

American Oversight submits this request to shed light on why DOD decided to remove board decisions in April 2019 and how it decided which board decisions to publish before April 2019.

Requested Records

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

1. All directives, guidance documents, or orders instructing personnel to remove past decisions by your department's Discharge Review Board (DRB) and Board for Correction of Military/Naval Records (BCMR) from online Reading Rooms.

Please provide all responsive records from January 1, 2019, through May 1, 2019.

2. All directives, guidance documents, or orders instructing personnel not to include certain types, categories, or individual DRB and BCMR decisions on your department's Reading Room.

Please provide all responsive records from January 1, 2016, through April 1, 2019.

3. All training materials and/or guidance documents provided to the personnel responsible for deciding which individual DRB and BCMR decisions should be included on your department's Reading Rooms. At a minimum, an adequate search would include searching for guidance on "liberal consideration" and "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder."

Please provide all responsive records from January 1, 2016, through January 1, 2020.

⁶ Ben Finley, *Lawsuit: Pentagon Withholding Info from Veterans' Advocates*, AP, Jan. 4, 2020, <https://www.military.com/daily-news/2020/01/04/lawsuit-pentagon-withholding-info-veterans-advocates.html>.

⁷ *In Response to NVLSP Lawsuit, Pentagon Swiftly Agrees to Promptly Make All DRB and Correction Board Decisions Publicly Available*, National Veterans Legal Services Program, Jan. 17, 2020, <https://www.nvlsp.org/news-and-events/press-releases/in-response-to-nvlsp-lawsuit-pentagon-swiftly-agrees-to-promptly-make-all-d>.

American Oversight believes that your agency is best positioned to determine where responsive records may reside. American Oversight requests that at a minimum you search agency officials involved in management of the DRBs and BCMRs of your agency, including relevant officials working in the offices of the Director, Deputy Director, Executive Officer, and the Senior Legal Advisor. While American Oversight does not intend to limit its request to the following offices, we suggest that records are likely to be housed in the following location:

Army Review Boards Agency

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."⁸ The public has a significant interest in understanding how veterans' appeals are processed and considered.⁹ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including helping veterans and their advocates to understand why board decisions were removed from public Reading Rooms. 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.¹⁰ 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

⁸ 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ Tyson Manker, 'Bad Paper' Discharges Brand Veterans for Life, THE NATION (Nov. 11, 2019), <https://www.thenation.com/article/military-veterans-day-discharge/>.

¹⁰ See 5 U.S.C. § 552(a)(4)(A)(iii).

also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹¹

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.¹² Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include 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;¹³ 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;¹⁴ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁵ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁶ and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁷

¹¹ American Oversight currently has approximately 15,300 page likes on Facebook and 101,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 28, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 28, 2020).

¹² *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

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>; *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>.

¹⁴ *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>.

¹⁵ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁶ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁷ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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.
- 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 conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ 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.¹⁹
- 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

¹⁸ 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).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

requirements to manage agency information electronically,²⁰ 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 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

²⁰ 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>.

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 Megan Field at foia@americanoversight.org or 202.897.2465. 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,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight