AMERICAN OVERSIGHT

March 4, 2020

VIA EMAIL, FOIA ONLINE, ONLINE PORTAL OR FACSIMILE

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.gov

Freedom of Information Officer
U.S. Centers for Disease Control and Prevention
1600 Clifton Road NE
Building 57, Room MS D-54
Atlanta, GA 30333
FOIARequests@cdc.gov

NIH FOIA Office
Building 31 Room 5B35
31 Center Drive, MSC 2107
Bethesda, MD 20892
nihfoia@mail.nih.gov

Robin Schofield
National Institute of Allergy and Infectious Diseases
Room 6G51
5601 Fishers Lane
Rockville, MD 20892
foia@niaid.nih.gov

Sarah Kotler
Freedom of Information Officer
Food and Drug Administration
5630 Fishers Lane, Room 1035
Rockville, MD 20857
Facsimile: (301) 827-9267

Hugh Gilmore
Freedom of Information Officer
Centers for Medicare & Medicaid Services
North Building, Room N2-20-06
7500 Security Boulevard
Baltimore, MD 21244
FOIA_Request@cms.hhs.gov

Freedom of Information Officer
Administration for Children & Families
U.S. Department of Health and Human Services
330 C Street SW
Washington, DC 20201
FOIA@acf.hhs.gov

Office of Information Programs and Services
U.S. Department of State
A/GIS/IPS/RL
SA-2, Suite 8100
Washington, DC 20522
foiarequest@state.gov

Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528
foia@hq.dhs.gov

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
edfoiamanager@ed.gov

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
ICE-FOIA@dhs.gov

FEMA Information Management Division
FOIA Request
500 C Street SW, Mailstop 3172
Washington, DC 20472
fema-foia@fema.dhs.gov

Stephanie Carr
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
U.S. Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Michael Bell
U.S. Department of Transportation
1200 New Jersey Avenue SE
W94-122
Washington, DC 20590
ost.foia@dot.gov

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

U.S. Department of Veterans Affairs
810 Vermont Avenue NW
(005R1C) VACO
Washington, DC 20420
vacofoiaservice@va.gov

Michael Sarich
Veterans Health Administration
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
(10P2C1) VACO
Washington, DC 20420
Vhafoia2@va.gov

FOIA Officer
U.S. Customs and Border Protection
90 K Street NE
FOIA Division
Washington, DC 20229
Via FOIAOnline

Departmental FOIA Officer
U.S. Department of Commerce
Office of Privacy and Open Government
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230
Via FOIA Online

Office of the Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
foiarequests@dol.gov

Ryan Law
FOIA and Transparency
Department of the Treasury
Washington, DC 20220
treasfoia@treasury.gov

Information Disclosure Section
Board of Governors of the Federal Reserve System
20th & Constitution Avenue NW
Washington, DC 20551
Facsimile: (202) 872-7565

FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503
OMBFOIA@omb.eop.gov

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 your agency, American Oversight makes the following request for records.

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.[1] Since late 2019, the virus has spread to dozens of countries, sickened tens of thousands of people, and resulted in thousands of deaths.[2] This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government. Yet the Trump administration has so far failed to ensure timely availability of testing kits for healthcare providers,[3] prevented health experts from speaking about the growing crisis,[4] and removed information on the spread of the virus from public health resources. [5]

American Oversight seeks records with the potential to shed light on this matter.

Requested Records

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

> All final talking points or background materials prepared for any congressional briefings or hearings or press engagements by the leadership officials at your agency specified below regarding the ongoing coronavirus outbreak.

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[1] *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/summary.html.
[2] *Coronavirus Live Updates: W.H.O Says Covid-19 Has Higher Fatality Rate Than the Flu,* N.Y. TIMES, Mar. 4, 2020, https://www.nytimes.com/2020/03/04/world/coronavirus-news.html?action=click&pgtype=Article&state=default&module=styln-coronavirus&variant=show&region=TOP_BANNER&context=storyline_menu.
[3] Alice Park, *Responding to Coronavirus Testing Problems, U.S. Government Expands Number of Labs That Can Run Tests* (Mar. 2, 2020, updated 1:50 PM EST), TIME, https://time.com/5793605/coronavirus-testing-united-states/.
[4] Michael Shear and Maggie Haberman, *Pence Will Control All Coronavirus Messaging from Health Officials,* N.Y. TIMES, Feb. 27, 2020, https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html.
[5] Brianna Ehley, *Trump's Team Shifts Tone from Preventing Coronavirus to Containing It*, POLITICO (Mar. 2, 2020, 7:52 PM), https://www.politico.com/news/2020/03/02/trump-coronavirus-pence-119051.

The relevant agency leadership officials are specified below*:

Department of Health and Human Services:

- Secretary Alex Azar
- Assistant Secretary for Preparedness and Response Robert Kadlec
- Assistant Secretary for Health Brett Giroir
- Surgeon General Jerome Adams
- Director of the Biomedical Advanced Research and Development Authority Rich Bright

Centers for Disease Control and Prevention:

- Director Robert Redfield
- Principal Deputy Director Anne Schuchat
- Director of the National Center for Immunization and Respiratory Diseases Nancy Messonnier
- Deputy Director for Infectious Diseases Jay C. Butler

National Institute for Health

- Director Francis Collins
- Director of the National Institute of Allergy and Infectious Diseases Anthony Fauci

Food and Drug Administration

- Commissioner Stephen Hahn
- Principal Deputy Commissioner Amy Abernethy
- Director of the Center for Drug Evaluation and Research Janet Woodcock
- Director of the Center for Devices and Radiological Health Jeff Shuren

Centers for Medicare and Medicaid Services

- Administrator Seema Verma
- Deputy Administrator Brady Brookes

Administration for Children and Families

- Assistant Secretary Lynn Johnson
- Principal Deputy Assistant Secretary Scott Lekan
- Anyone serving in the role of Deputy Assistant Secretary for External Affairs

Department of State

- Secretary Mike Pompeo
- Deputy Secretary Stephen Biegun
- Deputy Assistant Secretary Jonathan Fritz
- Principal Deputy Assistant Secretary Ian Brownlee
- Executive Director William A. Walters

Department of Defense
- Secretary Mark Esper
- Gen. Mark A. Milley

Department of Homeland Security
- Acting Secretary Chad Wolf
- Acting Deputy Secretary Ken Cuccinelli
- Acting Under Secretary for Science and Technology William Bryan

Customs and Border Patrol
- Acting Commissioner Mark Morgan
- Deputy Commissioner Robert E. Perez

Immigration and Customs Enforcement
- Acting Director Matthew T. Albence

Federal Emergency Management Agency
- Administrator Pete T. Gaynor
- Acting Deputy Administrator Daniel Kaniewski

Department of Transportation
- Secretary Elaine Chao
- Acting Under Secretary for Policy Joel Szabat

Department of Housing and Urban Development
- Secretary Ben Carson

Department of Veterans Affairs
- Secretary Robert Wilkie
- Executive in Charge Richard Stone

Department of Education
- Secretary Betsy DeVos
- Deputy Secretary Mick Zais

Department of Commerce
- Secretary Wilbur Ross
- Deputy Secretary Karen Dunn Kelley

Department of Labor
- Secretary Eugene Scalia
- Deputy Secretary Patrick Pizzella
- Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health Loren Sweatt

Department of Treasury
- Secretary Steven Mnuchin
- Deputy Secretary Justin Muzinich

Federal Reserve
- Chairman Jerome Powell
- Vice Chairman Richard H. Clarida

Office of Management and Budget
- Acting Director and Deputy Director Russell Vought
- Executive Associate Director Derek Kan

*American Oversight requests that your agency search only for officials at your agency in the above list. Thus, for example, American Oversight requests that CDC's search include any talking points and materials prepared for Robert Redwood, Anne Schuchat, and Nancy Messonnier, but not Secretary of State Pompeo.

Please provide all responsive records from January 28, 2020, through the date of the search.

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."[6] The public has a significant interest in the federal government's response to a national public health emergency.[7] Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including how effectively the government is protecting both the health and human rights of

[6] 5 U.S.C. § 552(a)(4)(A)(iii).

[7] *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1.

everyone in the country during this crisis.[8] 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.[9] 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.[10]

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.[11] 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;[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] posting records regarding potential self-dealing at the Department of Housing &

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[8] *Public Health and Law Experts Issue Guidelines for U.S. Response to Coronavirus*, YALE LAW SCHOOL, https://law.yale.edu/yls-today/news/public-health-and-law-experts-issue-guidelines-us-response-coronavirus-transmission.

[9] *See* 5 U.S.C. § 552(a)(4)(A)(iii).

[10] American Oversight currently has approximately 15,500 page likes on Facebook and 102,100 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Mar. 3, 2020); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Mar. 3, 2020).

[11] *News*, AMERICAN OVERSIGHT, https://www.americanoversight.org/blog.

[12] *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.

[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,

Urban Development and related analysis;[14] posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;[15] 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.[16]

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.

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https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall.

[14] *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.

[15] *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.

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

- 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.[17] 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.[18]

- 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,[19] 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

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[17] *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).
[18] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).
[19] 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.

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 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 Christine H. Monahan at foia@americanoversight.org or 202.869.5244. 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