



August 24, 2018

VIA Electronic Mail

CDC/ATSDR
Attn: FOIA Office, MS-D54
1600 Clifton Road, N.E.
Atlanta, GA 30333
FAX: (404) 235-1852
Email: FOIARequests@cdc.gov

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 the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, American Oversight makes the following request for records.

On May 17, 2018, at the American Association for Public Opinion Research Conference in Denver, Colorado, a Centers for Disease Control and Prevention (CDC) official reportedly announced that the agency will be rolling back support for collecting LGBTQ data in the agency's Behavior Risk Factor Surveillance System (BRFSS).¹ The BRFSS "is the nation's premier system of health-related telephone surveys," which "has become a powerful tool for targeting and building health promotion activities."² In response to the reported announcement, CDC has stated that the "2019 BRFSS questionnaire has not been finalized," but "[t]he sexual orientation and gender identity optional module is an approved optional module for the BRFSS and there are plans to make it available in 2019."³ However, given an apparent trend within the current administration of decreasing data collected and reported about LGBTQ individuals,⁴ and the importance of the

¹ See, e.g., *CDC to Roll Back Data Collection on the Health and Well-being of LGBT People*, THE WILLIAMS INST., UCLA SCHOOL OF LAW, May 17, 2018, <https://williamsinstitute.law.ucla.edu/press/cdc-data-rollback-brfss/>.

² *About BRFSS*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/brfss/about/index.htm> (last visited Aug. 21, 2018).

³ Chris Johnson, *CDC Denies LGBT Questions Removed from Federal Health Survey*, LOS ANGELES BLADE (May 24, 2018, 11:17AM), <http://www.losangelesblade.com/2018/05/24/cdc-denies-lgbt-questions-removed-from-federal-health-survey/>.

⁴ See, e.g., John Paul Brammer, *Justice Department Wants to Remove Questions for LGBTQ Teens From Crime Survey*, NBC NEWS (Apr. 23, 2018, 1:56 PM), <https://www.nbcnews.com/feature/nbc-out/justice-department-wants-remove-questions-lgbtq-teens-crime-survey-n865361>; *Trump Administration Continues Erasing LGBTQ People in Data Collection*, ANTI-VIOLENCE PROJECT, Apr. 13, 2018, <https://avp.org/words-matter-2/>; Sarah Kate Ellis, *President Trump is Trying to Erase the LGBTQ Community*, TIME, Jan. 16, 2018,



BRFSS to “policy making and designing evidence-based interventions to improve health and well-being,”⁵American Oversight seeks records that may shed light on the public statement that the module might be removed from the survey.

Requested Records

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

Any of the following records relating to the reported announcement at the May 17, 2018 American Association for Public Opinion Research Conference in Denver, Colorado that CDC will roll back support for the collection of LGBTQ data in CDC’s Behavior Risk Factor Surveillance System (BRFSS):

1. Records reflecting decisions, directives, policy statements, or guidance concerning the announcement, including but not limited to guidance concerning communications with any person or entity outside the executive branch relating to the announcement;
2. Records reflecting decisions, directives, policy statements, or guidance concerning communications with any person or entity outside the executive branch relating to BRFSS questions concerning sexual orientation and/or gender identity; and
3. Any communications with any person or entity outside the executive branch relating to the announcement and/or BRFSS questions concerning sexual orientation and/or gender identity.

Please provide all responsive records from May 17, 2018 through the date the search is conducted.

CDC is in the best position to determine the CDC components and offices that have records responsive to this request. However, American Oversight requests that CDC search, at a minimum, (a) the immediate Office of the Associate Director for Communication, (b) the immediate Office of the Division of Public Affairs of the Office of the Associate Director for Communication, and (c) the News Media Branch of the Office of the Associate Director for Communication. American Oversight also

<http://time.com/5104657/donald-trump-lgbt-rights>; M.J. Murphy, *Trump’s Erasure of LGBT People*, MEDIUM, May 19, 2018, <https://medium.com/th-ink/trumps-erasure-of-lgbt-people-761ebaf611a5>; Mary Emily O’Hara, *Trump Administration Removes LGBTQ Questions from Elderly Survey*, NBC NEWS (Mar. 20, 2017, 2:20 PM), <https://www.nbcnews.com/feature/nbc-out/trump-administration-removes-lgbtq-questions-elderly-survey-n735741>.

⁴ 28 C.F.R. § 16.10(k)(1), (2)(iii).

⁵ See THE WILLIAMS INST., *supra* note 1.

requests that CDC search any other components or offices that CDC determines are likely to contain responsive records.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If CDC uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

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.⁶ **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.**⁷

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 CDC’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage**

⁶ 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).

⁷ 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)).

information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁸ 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 CDC's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CDC 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” or “disclosure is prohibited by law.”⁹ 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.”¹⁰ 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.”¹¹ 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.’”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. 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.¹³ Claims of nonsegregability must be made with the same degree of detail as required

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹¹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹² *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)).

¹³ *Mead Data Central*, 566 F.2d at 261.

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, CDC is 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 and CDC can 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

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, 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.¹⁴ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁵

American Oversight requests a waiver of fees because disclosure of the requested information “would shed light on the operations of the government,” and is “likely to contribute significantly to public understanding of those operations or activities” of government operations and activities.¹⁶ As noted above, the BRFSS “is the nation’s premier system of health-related telephone surveys,”¹⁷ it “has become a powerful tool for targeting and building health promotion activities,”¹⁸ and the data it collects are “vital to policy making and designing evidence-based interventions to improve health and well-being.”¹⁹ LGBTQ individuals reportedly face disproportionate obstacles to accessing healthcare,²⁰ and CDC itself notes that “[t]he perspectives and needs of LGBT people should be

¹⁴ 45 C.F.R. § 5.54(a).

¹⁵ *Id.*

¹⁶ 45 C.F.R. § 5.54(b)(1)-(2).

¹⁷ *About BRFSS*, *supra* note 2.

¹⁸ *Id.*

¹⁹ *See* THE WILLIAMS INST., *supra* note 1.

²⁰ *See, e.g., US: LGBT People Face Healthcare Barriers*, HUMAN RIGHTS WATCH (July 23, 2018, 8:00AM), <https://www.hrw.org/news/2018/07/23/us-lgbt-people-face-healthcare-barriers>; Laura Joszt, *5 Vulnerable Populations in Healthcare*, AJMC MANAGED MARKETS NETWORK, July 20,

routinely considered in public health efforts to improve the overall health of every person and eliminate health disparities.”²¹ The public has an interest in decisions and communications concerning the collection of data vital to addressing LGBTQ individuals’ healthcare needs.

Moreover, there has been significant public interest in the administration’s apparent attempts to erase LGBTQ individuals from federal data collection, and the public deserves transparency surrounding such policy decisions or potential policy decisions.²² As discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.²³ 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.²⁴ 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,²⁵ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ’s process for ethics waivers.²⁶ 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

2018, <https://www.ajmc.com/newsroom/5-vulnerable-populations-in-healthcare>; Linda M. Canestraro, *Disparities in Care: LGBT Patients Are Vulnerable, Marginalized*, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, July-Aug. 2015, available at <https://www.chausa.org/publications/health-progress/article/july-august-2015/disparities-in-care-lgbt-patients-often-are-vulnerable-marginalized>.

²¹ *Lesbian, Gay, Bisexual, and Transgender Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/lgbthealth/index.htm> (last visited Aug. 21, 2018).

²² See, e.g., *supra* note 4.

²³ 45 C.F.R. § 5.54(b)(3).

²⁴ American Oversight currently has approximately 11,900 page likes on Facebook and 44,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited August 21, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited August 21, 2018).

²⁵ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁶ *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>.

information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁷

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 DOJ 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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. 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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

²⁷ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.