



April 19, 2018

VIA ELECTRONIC MAIL

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

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 the implementing regulations of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

In September 2017, Puerto Rico and the U.S. Virgin Islands were hit by Hurricanes Irma and Maria in rapid succession, storms judged to be among the most damaging in U.S. history.¹ The Federal Emergency Management Agency (FEMA) response to the crises caused by these hurricanes in Puerto Rico and the U.S. Virgin Islands has been criticized as insufficiently responsive and poorly managed.² As a result, Congress has sought records from DHS regarding the preparations for and response to these hurricanes, with a particular focus on an apparently mismanaged contracting process for emergency meals and FEMA's reported failure to provide emergency fuel supplies to prevent food spoilage.³ DHS, further, appears to have failed to provide

¹ AJ Willingham, *A Look at Four Storms from One Brutal Hurricane Season*, CNN (Nov. 21, 2017, 3:32 PM), <https://www.cnn.com/2017/10/10/weather/hurricane-nate-maria-irma-harvey-impact-look-back-trnd/index.html>; Angela Fritz, *Harvey, Irma and Maria Now in the Top Five Costliest Hurricanes on Record, NOAA Says*, WASH. POST, Jan. 30, 2018, https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/01/30/harvey-irma-and-maria-now-in-the-top-5-costliest-hurricanes-on-record-noaa-says/?utm_term=.4453e88c2dc2.

² See, e.g., Associated Press, *FEMA Ignored Puerto Rico in Aftermath of Hurricane Maria*, N.Y. POST (Mar. 21, 2018, 1:47 PM), <https://nypost.com/2018/03/21/fema-ignored-puerto-rico-in-aftermath-of-hurricane-maria/>.

³ Letter from Representative Trey Gowdy, Chairman & Representative Elijah Cummings, Ranking Mem. Comm. on Oversight and Government Reform, House of Representatives, to Elaine C. Duke, Acting Secretary, U.S. Dep't of Homeland Security (Oct. 11, 2017), <https://oversight.house.gov/wp-content/uploads/2017/10/2017-10-11-TG-EEC-to-Duke-DHS-Hurricane-Document-Request.pdf>.



the House of Representatives Committee on Oversight and Government Reform with documents responsive to the Committee's requests.⁴

American Oversight seeks records that have the potential to shed light on FEMA's response to Hurricanes Irma and Maria in Puerto Rico and the U.S. Virgin Islands.

Requested Records

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

1. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, Lync, Google Hangouts, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between 1) FEMA and 2) Walmart and other food retailers in Puerto Rico (including, but not limited to, Selectos Supermarket, Supermercado Econo and Edwards Food Market) concerning A) requests for fuel from food retailers in Puerto Rico; B) retailer decisions to close for any period of time due to a lack of fuel or power; C) retailer decisions to dispose of, discard or throw away perishable or nonperishable products after Hurricanes Maria and Irma.
2. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, Lync, Google Hangouts, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between 1) FEMA and 2) any member of Congress or congressional staff concerning A) requests for fuel from food retailers in Puerto Rico; B) retailer decisions to close for any period of time due to a lack of fuel or power; C) retailer decisions to dispose of, discard or throw away perishable or nonperishable products after Hurricanes Maria and Irma.
3. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, Lync, Google Hangouts, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic

⁴ Letter from Rep. Elijah Cummings, Ranking Mem. on Oversight and Government Reform, House of Representatives to Rep. Trey Gowdy, Chairman, on Oversight and Government Reform, House of Representatives (Feb. 6, 2018), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-02-06.EEC%20%26%20Plaskett%20to%20Gowdy%20re.FEMA-Tribute%20Contracting.pdf>; Letter from Rep. Elijah Cummings, Ranking Mem. on Oversight and Government Reform, House of Representatives to Rep. Trey Gowdy, Chairman, on Oversight and Government Reform, House of Representatives (Mar. 20, 2018), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-03-20.EEC%20%26%20Plaskett%20to%20Gowdy%20re.Walmart.pdf>.

notes taken during any oral communications, summaries of any oral communications, or other materials) between 1) FEMA and 2) any officials of the government of Puerto Rico concerning A) requests for fuel from food retailers in Puerto Rico; B) retailer decisions to close for any period of time due to a lack of fuel or power; C) retailer decisions to dispose of, discard or throw away perishable or nonperishable products after Hurricanes Maria and Irma.

4. Any and all final memoranda, guidance, reports or summaries concerning, analyzing or referring to A) requests for fuel from food retailers in Puerto Rico; B) retailer decisions to close for any period of time due to a lack of fuel or power; C) retailer decisions to dispose of, discard or throw away perishable or nonperishable products after Hurricanes Maria and Irma; D) FEMA's response to requests for fuel and power assistance from food retailers in Puerto Rico.

Please provide all responsive records from August 30, 2017, to the date of the search.

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 FEMA 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.**⁶

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 is subject to the Federal Records Act and FOIA.⁵ **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.**⁶

⁵ 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).

⁶ 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

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 FEMA’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.**⁷ Furthermore, agencies that have adopted the National Archives and Records Agency (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 FEMA’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that FEMA 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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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)).

⁷ 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>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *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)).

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.¹² 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, FEMA 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 FEMA before it undertakes a search or incurs search or duplication costs. By working together at the outset, American Oversight and FEMA 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 6 C.F.R. § 5.11(k), 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 the operations or activities of the government.”¹⁵ There is significant public interest in the FEMA’s emergency response to Hurricanes Irma and Maria in Puerto Rico and the U.S. Virgin Islands.¹⁶

¹² *Mead Data Central*, 566 F.2d at 261.

¹³ 6 C.F.R. § 5.11(k)(1)(i).

¹⁴ 6 C.F.R. § 5.11(k)(1)(ii).

¹⁵ 6 C.F.R. § 5.11(k)(1)(i); *see also* 6 C.F.R. § 5.11(k)(2)(i)-(iv).

¹⁶ *See, e.g.*, Ron Nixon & Matt Stevens, *Harvey, Irma, Maria: Trump Administration’s Response Compared*, N.Y. TIMES, Sep. 27, 2017, <https://www.nytimes.com/2017/09/27/us/politics/trump-puerto-rico-aid.html>; Morgan Winsor, *How the Federal Government Has Responded to Puerto Rico Since Hurricane Maria*, ABC NEWS (Sep. 28, 2017, 4:02 PM), <http://abcnews.go.com/US/federal-government-responded-puerto-rico-hurricane->

And there is particularly strong public interest FEMA’s apparent failure to deliver emergency fuel supplies to strategic locations to prevent food spoilage, or even to communicate with food retailers and Puerto Rican government officials about such requests.¹⁷ The records American Oversight seeks have the potential to shed significant light on the effectiveness of FEMA’s efforts to respond to costly natural disasters that have taken the lives of hundreds of American citizens,¹⁸ and which continue to plague citizens with serious after-effects, including continued power outages and a possible suicide crisis.¹⁹ The American people deserve to know whether their government is acting effectively to address national disasters and whether their tax dollars are being used responsibly in FEMA response efforts. And, 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.²⁰ 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 promote their availability on social media platforms, such as Facebook and Twitter.²¹ American

[maria/story?id=50152714](#); Danny Vinik, *How Trump Favored Texas Over Puerto Rico*, POLITICO (Mar. 27, 2018, 5:00 AM), <https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557>; Sarah Ferris, *Virgin Islands Lack Supplies*

¹⁷ Associated Press, *FEMA Silent Amid Chaos in Puerto Rico After Hurricane Maria, Emails Show*, NBC NEWS (Mar. 22, 2018, 12:08 PM), <https://www.nbcnews.com/storyline/puerto-rico-crisis/fema-silent-amid-chaos-puerto-rico-after-hurricane-maria-emails-n859081>; Lorraine Woellert, *Tons of Food Went to Waste in Puerto Rico as Stores’ Pleas to FEMA Went Unanswered*, POLITICO (Mar. 21, 2018, 2:22 PM), <https://www.politico.com/story/2018/03/20/puerto-rico-food-waste-fuel-476299>; Letter From Rep. Cummings (Mar. 20, 2018), *supra* note 4.

¹⁸ Kristin Hugo, *Hurricane Maria Death Toll in Puerto Rico Might be Much Higher, Research Suggests*, NEWSWEEK (Apr. 9, 2018, 1:15 PM), <http://www.newsweek.com/hurricane-maria-killed-more-puerto-ricans-we-know-877518>.

¹⁹ James Wagner & Frances Robles, *Puerto Rico is Once Again Hit by an Islandwide Blackout*, N.Y. TIMES, Apr. 18, 2018, <https://www.nytimes.com/2018/04/18/us/puerto-rico-power-outage.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>; Rick Jervis, *6 Months After Hurricane Maria, Life in Puerto Rico is Better – but Will ‘Never Be Normal Again’*, USA TODAY (Mar. 5, 2018, 2:56 PM), <https://www.usatoday.com/story/news/2018/03/05/6-months-after-hurricane-maria-life-puerto-rico-better-but-far-normal/380127002/>; Alexia Fernandez Campbell, *6 Months After Hurricane Maria, Puerto Rico Has a Suicide Crisis and a Housing Shortage*, VOX (Mar. 20, 2018, 1:50 PM), <https://www.vox.com/policy-and-politics/2018/3/20/17138990/puerto-rico-hurricane-maria-6-months>.

²⁰ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)–(ii).

²¹ American Oversight currently has approximately 11,900 page likes on Facebook and 41,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 18, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last Apr. 18, 2018).

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, American Oversight promptly posted the records to its website²² and published an analysis of what the records reflected about DOJ's process for ethics waivers.²³ 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.²⁴

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 FEMA 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

²² *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²³ *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>.

²⁴ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.