



March 9, 2017

**VIA ELECTRONIC SUBMISSION PORTAL**

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Department of Justice  
170 Marcel Drive  
Winchester, VA 22602-4843  
Online Request via <https://efoia.fbi.gov>

**Re: Expedited Freedom of Information Act Request**

Dear Mr. Hardy:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and the Department of Justice's implementing regulations, 28 CFR Part 16, American Oversight makes the following request for records.

On February 14, 2017, the *New York Times* and other news outlets began reporting that associates affiliated with Mr. Trump's presidential campaign had contact with Russian intelligence officials.<sup>1</sup> The White House denied the allegation.<sup>2</sup> The following week reports began to emerge that White House Chief of Staff Reince Priebus had contacted the Federal Bureau of Investigation (FBI) to ask the agency "to publicly knock down media reports about communications between Donald Trump's associates and Russians known to US intelligence during the 2016 presidential campaign."<sup>3</sup>

In May 2009, then-Attorney General Eric Holder issued a memorandum to the heads of all Department of Justice components (including the FBI) and all U.S. Attorneys entitled, "Communications with the White House and Congress." The memo reads in relevant part: "Initial

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<sup>1</sup> See Michael Schmidt *et al.*, *Trump Campaign Aides Had Repeated Contacts with Russian Intelligence*, N.Y. TIMES, Feb. 14, 2017, <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html>.

<sup>2</sup> See Edward Helmore, *White House Denies Reports of Russian Contacts Amid Search to Replace Flynn*, THE GUARDIAN, Feb. 19, 2017, <https://www.theguardian.com/us-news/2017/feb/19/trump-administration-russia-reince-priebus>.

<sup>3</sup> See Jim Sciutto *et al.*, *FBI Refused White House Request to Knock Down Recent Trump-Russia Stories*, CNN (Feb. 24, 2017, 12:19 AM), <http://www.cnn.com/2017/02/23/politics/fbi-refused-white-house-request-to-knock-down-recent-trump-russia-stories/>.

communications between the Department and the White House concerning pending or contemplated criminal investigations or cases will involve **only** the Attorney General or the Deputy Attorney General, from the side of the Department, and **the Counsel to the President, the Principal Deputy Counsel to the President, the President or the Vice President, from the side of the White House.**<sup>4</sup> There have been no reports that the memo has been rescinded or revised. The public has a right to know whether the White House Chief of Staff is acting consistent with long-standing DOJ protocol. Moreover, the public deserves information regarding whether and to what extent the FBI may have agreed or acquiesced to disregarding DOJ protocol.

### Requested Records

American Oversight requests that FBI produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All communications between White House Chief of Staff Reince Priebus or any individuals acting on Priebus's behalf, and any personnel at the FBI regarding February 2017 news reports of an FBI investigation dating back to summer 2016 into affiliations between then-candidate Donald J. Trump (and his associates) and Russians known to intelligence officials;
2. All communications since November 8, 2016, between the FBI and the news media regarding an FBI investigation dating back to summer 2016 into affiliations between then-candidate Donald J. Trump (and his associates) and Russians known to intelligence officials;
3. All communications between the FBI and the news media regarding the alleged White House conversations about what the FBI should say about its investigation; and
4. All communications between the FBI and any member of Congress or congressional staff, regarding the alleged White House conversations about what the FBI should say about its investigation.

Please provide all responsive records through the date the search is conducted.

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 your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe

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<sup>4</sup> Office of the Attorney General, Memorandum for Heads of Department Components & All United States Attorneys, "Communications with the White House and Congress" (May 11, 2009), available at <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> (emphasis added); see also Jane Chong, *White House Interference with Justice Department Investigations: That 2009 Holder Memo*, LAWFARE (Feb. 22, 2017, 4:12 PM), <https://www.lawfareblog.com/white-house-interference-justice-department-investigations-2009-holder-memo>.

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 is subject to the Federal Records Act and FOIA.<sup>5</sup> **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.**<sup>6</sup>

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 the FBI’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.**<sup>7</sup> Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form

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<sup>5</sup> 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).

<sup>6</sup> 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)).

<sup>7</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), available at <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 & Agencies & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), available at <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

**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 the archiving tools of the FBI would capture that email under Capstone. Accordingly, American Oversight insists that you 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.”<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.’”<sup>11</sup>

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.<sup>12</sup> 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, the FBI 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

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

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

<sup>10</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>11</sup> *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)).

<sup>12</sup> *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and the FBI 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 15<sup>th</sup> Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(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. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).<sup>13</sup>

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 government operations and is not “primarily in the commercial interest of the requester.”<sup>14</sup> The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public’s business.

As discussed above, Mr. Priebus’s reported contacts with the FBI regarding pending investigations raise serious questions about whether Mr. Priebus acted inconsistently with longstanding protocols and the governing White House contacts policy. The requested documents will shed light on this issue of considerable interest to the public regarding the operations of the federal government.

This request is primarily and fundamentally for non-commercial purposes. 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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website.

Accordingly, American Oversight qualifies for a fee waiver.

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<sup>13</sup> See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

<sup>14</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. §16.10(k).

## Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), American Oversight requests that the FBI expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence. As discussed above, Mr. Priebus's reported contacts with the FBI regarding pending investigations raise serious questions about whether Mr. Priebus acted inconsistently with longstanding protocols and the governing White House contacts policy. The requested documents will shed light on these issues of considerable interest to the public. The nature of Mr. Priebus's contacts with the FBI are a quintessential example of "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."<sup>15</sup>

This matter already has been the subject of widespread media interest and attention. *See, e.g.*, Isaac Arnsdorf, *Priebus Request to FBI Violated Norms If Not Rules*, POLITICO (Feb. 24, 2017, 12:49 PM), <http://www.politico.com/story/2017/02/reince-priebus-fbi-contact-trump-235351>; Bryan Naylor, *White House Asked FBI To Publicly Refute Reports Trump Associates Had Russia Contacts*, NAT'L PUBLIC RADIO (Feb. 24, 2017, 11:42 AM), <http://www.npr.org/2017/02/24/517011779/white-house-asked-fbi-to-publicly-refute-reports-trump-associates-had-russia-con>; Chris Perez, *FBI Rejected White House Request to Publicly Slam Trump-Russia Reports*, N.Y. POST, Feb. 23, 2017, <http://nypost.com/2017/02/23/fbi-rejected-white-house-request-to-publicly-slam-trump-russia-reports>; Michael Schmidt *et al.*, N.Y. TIMES, Feb. 14, 2017, Edward Helmore, THE GUARDIAN, Feb. 19, 2017.

Accordingly, American Oversight's request satisfies the criteria for expedition.

## Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with you 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 us at [foia@americanoveright.org](mailto:foia@americanoveright.org). 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

cc: Sarah Isgur Flores, Director, Office of Public Affairs

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<sup>15</sup> 28 C.F.R. § 16.5(e)(1)(iv).