



October 24, 2017

**VIA ELECTRONIC MAIL & ONLINE PORTAL**

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Chief FOIA Officer  
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U.S. Department of Homeland Security  
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Sabrina Burroughs  
FOIA Officer  
U. S. Customs & Border Protection  
1300 Pennsylvania Avenue NW, Room 3.3D  
Washington, DC 20229  
Online Request at FOIAonline

**Re: Freedom of Information Act Request**

Dear Mr. Kaplan and Ms. Burroughs:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, 6 C.F.R. Part 5 and 19 C.F.R. § 103.2, American Oversight makes the following request for records.

A review of the Twitter feed for the U.S. Customs & Border Protection (CBP) indicates that the agency launched a "Catch of the Day" hashtag earlier this year as part of its promotion of the agency's work.<sup>1</sup> CBP first used the hashtag on February 7, 2017, in a tweet about the seizure of \$500,000 worth of methamphetamine in South Texas.<sup>2</sup> The hashtag has been used by CBP a total of seventeen times to promote interdictions, seizures, and arrests. Although previous tweets highlighting arrests did not include pictures, most recently, on October 20, the agency used the hashtag with a tweet that included the pictures of four men taken into custody "awaiting a disposition on felony criminal immigration violations."<sup>3</sup> Pairing the hashtag "Catch of the Day"—a phrase obviously invoking the freshest fish being served at a restaurant or sold by a fishmonger—with photos of human beings strikes a conscious reader as dehumanizing. The biased, propagandizing nature of combining the hashtag with pictures of detained persons is particularly

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<sup>1</sup> It does not appear that this hashtag is used by the Department of Homeland Security (DHS) itself or any other DHS components.

<sup>2</sup> CBP (@CustomsBorder), TWITTER (Feb. 7, 2017, 8:50 AM), <https://twitter.com/CustomsBorder/status/828964125501976577>.

<sup>3</sup> CBP (@CustomsBorder), TWITTER (Oct. 20, 2017, 3:00 PM), <https://twitter.com/CustomsBorder/status/921450995258970112> (linking to Press Release, U.S. Customs and Border Prot., Agents Arrest Four Illegal Felons in Separate Incidents (Oct. 17, 2017), <https://www.cbp.gov/newsroom/local-media-release/agents-arrest-four-illegal-felons-separate-incidents>).



disturbing in light of recent records from Immigration and Customs Enforcement (ICE) indicating that top Trump appointees at the Department of Homeland Security (DHS) were trying to promote the portrayal of undocumented immigrants as criminals.<sup>4</sup> The ICE initiative seems to have begun in February, around the same time CBP began using the “Catch of the Day” hashtag. American Oversight seeks records that will inform the public how CBP came to use this hashtag.

### **Requested Records**

American Oversight requests that the Department of Homeland Security (DHS) and its component CBP produce the following within twenty business days:

1. All electronic mail containing any of the following terms:
  - a. Catch of the Day
  - b. #CatchOfTheDay
  - c. Keeping America Safe
  - d. #KeepingAmericaSafe
  
2. All electronic mail containing the word “hashtag” and any of the following words or phrases:
  - a. S1
  - b. S2
  - c. Secretary
  - d. Deputy Secretary
  - e. DepSec
  - f. Kelly
  - g. Duke
  
3. All electronic mail containing any hashtags (“#”) and any of the following words or phrases:
  - a. Illegal
  - b. Illegals
  - c. Alien
  - d. Aliens
  - e. Felon
  - f. Felons
  - g. Criminal
  - h. Criminals

For DHS, the search for responsive records can be limited to:

- the Office of the Secretary;
- the Office of the Deputy Secretary;
- the Office of the Under Secretary for Management; and
- the Office of the Assistant Secretary of Public Affairs.

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<sup>4</sup> Alice Speri, *Top Trump Official John Kelly Ordered ICE to Portray Immigrants as Criminals to Justify Raids*, THE INTERCEPT (Oct. 16, 2017, 2:35 PM), <https://theintercept.com/2017/10/16/top-trump-official-john-kelly-ordered-ice-to-portray-immigrants-as-criminals-to-justify-raids/>.

For CBP, the search for responsive records can be limited to:

- the Office of the Commissioner, including the Commissioner, Chief of Staff, and Deputy Chief of Staff;
- the Office of the Deputy Commissioner, including the Deputy Commissioner and the Deputy Commissioner's Chief of Staff;
- the Office of Public Affairs, including the Assistant Commissioner for Public Affairs;
- the Chief of the U.S. Border Patrol;
- the Executive Assistant Commissioner for Field Operations;
- the Executive Assistant Commissioner for Air and Marine Operations; and
- the Executive Assistant Commissioner for Trade.

Please provide all responsive records from January 20, 2017, through 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 DHS 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 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**

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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).

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 DHS’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 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 DHS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DHS 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

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<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), <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>.

<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).

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, DHS 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 DHS 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 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.<sup>13</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>14</sup>

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<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.

<sup>13</sup> 6 C.F.R. § 5.11(k)(1)(i).

<sup>14</sup> 6 C.F.R. § 5.11(k)(1)(ii).

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.”<sup>15</sup> In February 2017, CBP began using the hashtag “Catch of the Day” on Twitter.<sup>16</sup> The requested records will help American Oversight and the general public understand the origins of and reasoning behind CBP’s “#CatchOfTheDay” publicity effort. Particularly in light of DHS’s directive earlier this year to create a narrative of the “criminal” immigrant,<sup>17</sup> it is necessary that the public have access to records illuminating the communications strategy around CBP’s latest enforcement efforts.

This request is primarily and fundamentally for non-commercial purposes.<sup>18</sup> 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 our public website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>19</sup> 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, American Oversight promptly posted the records to its website<sup>20</sup> and published an analysis of what the records reflected about DOJ’s process for ethics waivers.<sup>21</sup> Additionally, this particular FOIA request is part of a public project conducted by American Oversight 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.<sup>22</sup>

Accordingly, American Oversight qualifies for a fee waiver.

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<sup>15</sup> 6 C.F.R. § 5.11(k)(1)(i), (2)(i)-(iv).

<sup>16</sup> See CBP, *supra* note 2; Search of #catchoftheday from @CustomsBorder, TWITTER, <https://twitter.com/search?src=typd&q=%23catchoftheday%20from%3ACustomsBorder> (last visited Oct. 23, 2017).

<sup>17</sup> See Speri, *supra* note 4.

<sup>18</sup> 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

<sup>19</sup> American Oversight currently has approximately 11,600 page likes on Facebook, and 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 23, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 23, 2017).

<sup>20</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>21</sup> *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>.

<sup>22</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

## Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DHS 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 Cerissa Cafasso at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.869.5246. 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