



March 13, 2018

VIA ELECTRONIC MAIL

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U.S. Department of Homeland Security
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Toni Fuentes
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Directorate for National Protection and
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U.S. Department of Homeland Security
Washington, DC 20528
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Re: Expedited Freedom of Information Act Request

Dear Ms. Barksdale-Perry & Ms. Fuentes:

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.

The U.S. intelligence community has concluded that the Russian government carried out a campaign to influence the 2016 U.S. election.¹ The Russian campaign is reported to have included hacking of political party networks,² using fraudulent accounts on social media sites,³ and attempted hacking of 21 states' voter registration files or public election sites.⁴ Highlighting the urgency required to address the threat of Russian election interference, Director of National Intelligence

¹ See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

² David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. TIMES, Dec. 9, 2016, <https://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

³ Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES, Sep. 7, 2017, <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>.

⁴ Sari Horowitz et al., *DHS Tells States About Russian Hacking During 2016 Election*, Washington Post, Sep. 22, 2017, https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8eal-ed975285475e_story.html?utm_term=.258dbed762fa.



Daniel Coats recently testified that Russia will likely attempt to influence the 2018 U.S. midterm elections.⁵

Despite this pressing threat, public reports suggest that the Trump administration is not taking sufficient action to protect the integrity of U.S. elections. National Security Agency (NSA) Director Admiral Michael Rogers has testified that President Trump has not ordered his agency to counter Russian hacking attacks at their origin.⁶ And, the State Department has not expended any of the \$120 million Congress allocated for that agency's use in countering Russian influence efforts.⁷

American Oversight seeks to determine whether the administration is taking action to protect the integrity of U.S. elections, particularly in light of the impending threat of interference in the 2018 midterm elections.

Requested Records

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

All records reflecting communications (including but not limited to emails, email attachments, text messages, chat or Slack messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials) between DHS and any member of Congress or congressional staff concerning (1) election security or integrity; (2) the designation of election infrastructure as critical infrastructure; (3) actual or potential foreign attempts to influence, affect, or hack U.S. elections or election systems; or (4) efforts to prevent future attempts to influence, affect, or hack U.S. elections or election systems.

Please provide all responsive records from November 8, 2016, to the date of the search.

DHS is in the best position to determine the DHS components and offices that have records responsive to this request. However, public reporting indicates that, at a minimum, the following offices likely possess responsive records: (a) the Office of the Secretary, (b) the Office of the Deputy Secretary and (c) the National Protection and Programs Directorate (NPPD). American Oversight therefore requests that DHS search those three offices and any other components or offices that DHS determines are likely to contain responsive records.

⁵ Patricia Zengerle, *Top U.S. Intel Official Insists White House Engaged on Election Security*, Reuters, Mar. 6, 2018, <https://www.reuters.com/article/us-usa-security/top-u-s-intel-official-insists-white-house-engaged-on-election-security-idUSKCN1GI287?il=0>.

⁶ David Welna, *NSA Chief: U.S. Response 'Hasn't Changed the Calculus' of Russian Interference*, NPR, Feb. 27, 2018, <https://www.npr.org/sections/thetwo-way/2018/02/27/589143771/nsa-chief-u-s-response-hasn-t-changed-the-calculus-of-russian-interference>.

⁷ Gardiner Harris, *State Dept. Was Granted \$120 Million to Fight Russian Meddling. It Has Spent \$0.*, N.Y. TIMES, Mar. 4, 2018, <https://www.nytimes.com/2018/03/04/world/europe/state-department-russia-global-engagement-center.html>.

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.⁸ **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.**⁹

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.**¹⁰ Furthermore, agencies that have adopted the National Archives and

⁸ 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).

⁹ 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)).

¹⁰ 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,

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.”¹¹ 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.”¹² 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.”¹³ 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.’”¹⁴

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.¹⁵ 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 DHS before it undertakes a search or incurs search or

“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *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)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

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 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.¹⁶ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁷

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.”¹⁸ There is significant public interest in DHS’s role in ensuring that countering foreign efforts to influence U.S. elections and hack U.S. election systems. The records American Oversight seeks have the potential to shed significant light on the extent and efficacy of DHS efforts to bolster vulnerable states’ election systems and the degree to which DHS has prioritized protecting U.S. elections from interference more broadly. The American people deserve to know whether their government is acting forcefully to ensure the integrity of the election process. 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.¹⁹ 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.²⁰ 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

¹⁶ 6 C.F.R. § 5.11(k)(1)(i).

¹⁷ 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁹ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

²⁰ American Oversight currently has approximately 11,800 page likes on Facebook and 41,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 13, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 13, 2018).

senior DOJ attorney, American Oversight promptly posted the records to its website²¹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²² 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.²³

Accordingly, American Oversight qualifies for a fee waiver.

Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e), American Oversight requests that DHS expedite the processing of this request for two independent reasons: (1) there is an urgency to inform the public concerning actual or alleged government activity, and American Oversight disseminates information to the public; and (2) the matter is of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity.²⁴ The information American Oversight seeks concerns "a matter of a current exigency to the American public."²⁵ As described above, U.S. national intelligence agencies have concluded that the Russian government used various methods to interfere the 2016 U.S. election.²⁶ Top national security officials have recently stated publicly that the Russian government will likely meddle in the fast-approaching 2018 midterm elections, and current U.S. efforts to protect against such meddling are inadequate.²⁷

DHS has notified states of previous Russian hacking, or attempted hacking, of their election systems, but recent reporting has revealed that it is still unclear whether DHS has adequately engaged with targeted states to prevent future tampering with those systems.²⁸ And other federal agencies, including the NSA and State Department, have raised questions about whether they are

²¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

²⁴ 6 C.F.R. § 5.5(e)(1)(ii).

²⁵ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3469).

²⁶ *See e.g.*, Sanger & Shane, *supra* note 2; Sanger, *supra* note 3.

²⁷ Zengerle *supra* note 5; Welna *supra* note 6.

²⁸ Miles Parks, *1 State? 7 States? Uncertainty Persists About Russian Cyberattacks on U.S. Election*, NPR (Mar. 1, 2018, 5:00 AM), <https://www.npr.org/2018/03/01/589485777/1-state-7-states-uncertainty-persists-about-russian-cyberattacks-on-u-s-election>.

taking sufficient action to counter Russian attempts to interfere in U.S. elections.²⁹ There is an urgent need to inform the public about the efforts DHS is undertaking, or failing to undertake, to safeguard the integrity of U.S. elections well in advance of the midterm elections. The American people need access to this information with sufficient time to push DHS to correct any insufficiencies in its efforts before the midterm elections.

I further certify that American Oversight is primarily engaged in disseminating information to the public.³⁰ 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,³¹ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”³² American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.³³ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.³⁴

Additionally, I certify that the subject of this request is a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.³⁵ Russian efforts to meddle in U.S. elections have broadly received nearly constant media coverage, and the adequacy of DHS efforts to defend against Russian hacking and interference have elicited widespread media interest.³⁶ From the beginning of 2017, DHS's

²⁹ Welna *supra* note 6; Harris *supra* note 7.

³⁰ 6 C.F.R. § 5.5(e)(1)(ii).

³¹ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

³² *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

³³ American Oversight currently has approximately 11,800 page likes on Facebook and 41,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Mar. 13, 2018); American Oversight (@weareoversight), TWITTER (last visited Mar. 13, 2018).

³⁴ See *DOJ Civil Division Response Noel Francisco Compliance*, 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>; *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

³⁵ 6 C.F.R. § 5.5(e)(1)(iv).

³⁶ See e.g., Patrick Donohue & Kevin Meyer, *Trump Official Calls Russian Meddling Charges Indisputable*, BLOOMBERG (Feb. 17, 2018, 10:16 AM), <https://www.bloomberg.com/news/articles/2018-02-17/trump-official-calls-russian-meddling-charges-incontrovertible>; Katherine Faulders & Lauren Pearle, *Despite Doubts, Trump Administration Insists Russian Meddling Will Be Countered*, ABC NEWS (Mar. 13, 2018, 6:10 AM), <http://abcnews.go.com/Politics/doubts-trump-administration-insists-russian-meddling-countered/story?id=53698473>; Morgan Chalfant, *Homeland Security Chief Touts Effort on Election Cybersecurity*, THE HILL (Feb. 20, 2018, 9:16 AM),

decision to classify election infrastructure as a critical infrastructure garnered extensive media coverage.³⁷ DHS's eventual decision to inform 21 states that Russia attempted to hack their election systems, and its failure to so inform these states earlier, also received extensive media interest.³⁸ And continued DHS actions, and seeming inaction, related to election protection have continued to receive persistent, widespread coverage.³⁹ This includes recent reports that seven states' systems may have actually been compromised, at least to some extent, by Russian hacking efforts.⁴⁰

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 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 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

<http://thehill.com/policy/cybersecurity/374600-homeland-security-chief-touts-effort-on-election-cybersecurity>.

³⁷ See e.g., Tim Starks, *DHS Labels Elections as 'Critical Infrastructure'*, POLITICO (Jan. 6, 2017, 6:39 PM), <https://www.politico.com/story/2017/01/elections-critical-infrastructure-homeland-security-233304>; Kaveh Waddell, *Why Elections Are Now Classified as 'Critical Infrastructure'*, THE ATLANTIC, Jan. 13, 2017, <https://www.theatlantic.com/technology/archive/2017/01/why-the-government-classified-elections-as-critical-infrastructure/513122/>;

³⁸ See e.g., Horowitz et al., *supra* note 4; Joe Uchill, *DHS Tells 21 States They Were Russian Hacking Targets Before 2016 Election*, THE HILL (Sep. 22, 2017, 5:21 PM), <http://thehill.com/policy/cybersecurity/351981-dhs-notifies-21-states-of-they-were-targets-russian-hacking>.

³⁹ See e.g., Cynthia McFadden et al., *Russians Penetrated U.S. Voter Systems, Top U.S. Official Says*, NBC NEWS (Feb. 8, 2018, 7:28 AM), <https://www.nbcnews.com/politics/elections/russians-penetrated-u-s-voter-systems-says-top-u-s-n845721>.

⁴⁰ Jen Kurby, *Report: Russia Probed At Least 7 States' Voter Systems Before the 2016 Election*, VOX (Feb. 27, 2018, 8:57 PM), <https://www.vox.com/2018/2/27/17060132/intelligence-russia-hacking-us-elections>.