



January 4, 2018

VIA ELECTRONIC MAIL

Catrina Pavlik-Keenan
Freedom of Information Act Office
U.S. Immigration & Customs Enforcement
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
ice-foia@dhs.gov

Re: Freedom of Information Act Request

Dear Ms. Pavlik-Keenan:

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.

On January 3, 2018, President Trump issued an executive order disbanding his Presidential Advisory Commission on Election Integrity.¹ In media reports, Kris Kobach, the Commission's Vice Chair, stated that "he expects officials from Immigration and Customs Enforcement and political appointees overseeing that agency to take over the commission's work."² American Oversight seeks records to illuminate whether, to what extent, and how the work of the Commission is being transferred to ICE.

Requested Records

American Oversight requests that Immigration and Customs Enforcement (ICE) produce the following within twenty business days:

1. All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, or other materials) regarding the Presidential Advisory Commission on Election Integrity, including its creation, establishment, dissolution, functions, mission, objectives, management, membership, authority, scope, costs, meetings, legal obligations, and/or issues of election integrity, the

¹ Josh Gerstein & Matthew Nussbaum, *Trump Disbands Voter Fraud Commission*, POLITICO (Jan. 3, 2018, 9:51PM), <https://www.politico.com/story/2018/01/03/trump-disbands-voter-fraud-commission-322621>.

² *Id.*



security of federal, state, or local elections, or the registration or participation of non-U.S. citizens in federal, state, or local elections, including regarding any information ICE has gathered or could gather regarding or related to voting in U.S. elections by non-citizens, between ICE (including those persons in the immediate Office of the Director, including the Chief of Staff, the Deputy Chief of Staff, the Senior Advisor to the Director, and any Special Assistants; the Deputy Director; the Principal Legal Advisor; and the Assistant Director of Congressional Relations) and any of the following:

- a. Any employee in the Office of the Secretary of Homeland Security or in the Office of the Deputy Secretary of Homeland Security; or
- b. Any employee of the White House, including Chief of Staff John Kelly, Andrew Kossack, anyone from the Office of the Vice President, anyone from the White House Counsel's Office, or anyone else whose email address ends in "who.eop.gov"; or
- c. Any member or staff member of the Commission including:
 - i. Kris Kobach, Secretary of State for Kansas;
 - ii. Connie Lawson, Secretary of State of Indiana;
 - iii. Bill Gardner, Secretary of State of New Hampshire;
 - iv. Matthew Dunlap, Secretary of State of Maine;
 - v. Ken Blackwell, former Secretary of State of Ohio;
 - vi. Christy McCormick, Commissioner, Election Assistance Commission;
 - vii. David Dunn, former Arkansas State Representative;
 - viii. Mark Rhodes, Clerk of Wood County, West Virginia;
 - ix. Hans von Spakovsky, Senior Legal Fellow and Manager of Election Law Reform Initiative, Edwin Meese Center for Legal & Judicial Studies, Heritage Foundation;
 - x. J. Christian Adams, President and General Counsel, Public Interest Legal Foundation;
 - xi. Alan King, Probate Judge, Jefferson County, Alabama; and
 - xii. Luis Borunda, Deputy Secretary of State of Maryland; or
- d. any member of Congress, including congressional staff.

Please provide all responsive records from May 11, 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 ICE 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.³ **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.**⁴

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 ICE’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.**⁵ 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 ICE’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that ICE 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;**

³ 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).

⁴ 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)).

⁵ 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>.

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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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, ICE 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 ICE 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.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

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.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

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.”¹³ The president has made serious allegations that his popular-vote loss in the 2016 election was the result of *millions* of people casting illegal ballots.¹⁴ Investigating such fraudulent voting was an early initiative of his administration,¹⁵ formalized when he signed Executive Order 13,799, establishing the Presidential Advisory Commission on Election Integrity.¹⁶ With its dissolution and the seeming referral to DHS and ICE to continue the Commission’s work,¹⁷ the requested records will help American Oversight and the general public understand the scope of the government’s concern regarding election integrity and DHS’s mandate to address the issue moving forward. As discussed below, American Oversight has the capacity and intention to inform a broad audience and interested public about the government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁸ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the

¹¹ 6 C.F.R. § 5.11(k)(1)(i).

¹² 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁴ *See* Peter Baker & Maggie Haberman, *The Election Is Over, but Trump Can’t Seem to Get Past It*, N.Y. TIMES, May 13, 2017, <https://www.nytimes.com/2017/05/13/us/politics/election-is-over-but-trump-still-cant-seem-to-get-past-it.html>; *Trump Again Claims He ‘Would Have Won’ Popular Vote*, BBCNEWS, Dec. 21, 2016, <http://www.bbc.com/news/world-us-canada-38397594>; Emma Green, *The White House Clings to False Claims of Massive Voter Fraud*, THE ATLANTIC, Jan. 24, 2017, <https://www.theatlantic.com/politics/archive/2017/01/trump-is-still-concerned-about-voter-fraud/514319/>; Ros Krasny, *Trump Claims Millions Voted Illegally, Without Giving Proof*, BLOOMBERG (Nov. 28, 2016, 3:05 PM), <https://www.bloomberg.com/news/articles/2016-11-27/trump-suggesting-voter-fraud-says-he-won-the-popular-vote>; Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES, Jan. 23, 2017, <https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html>.

¹⁵ *See* Green, *supra* note 14; Dan Merica et al., *Trump Considers Executive Order on Voter Fraud*, CNNPOLITICS (Jan. 25, 2017, 6:57 PM), <http://www.cnn.com/2017/01/25/politics/trump-calls-for-major-investigation-into-voter-fraud/index.html>.

¹⁶ Exec. Order No. 13,799 of May 11, 2017, 82 Fed. Reg. 22,389 (May 16, 2017).

¹⁷ *See* Gerstein & Nussbaum, *supra* note 1.

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

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.¹⁹ 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 website²⁰ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²¹ 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.²²

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 ICE 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 or 202.869.5244. 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

¹⁹ American Oversight currently has approximately 11,700 page likes on Facebook, and 38,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 4, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 4, 2018).

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

²¹ *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>.

²² *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.