



March 20, 2017

VIA ELECTRONIC SUBMISSION PORTAL

Laurie Day
Chief, Initial Request Staff, Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001
Online Request via FOIAonline

Kevin Krebs
Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Room 7300, 600 E Street, N.W.
Washington, DC 20530-0001
Online Request at FOIAonline

Re: Expedited Freedom of Information Act Request

Dear Ms. Day and Mr. Krebs:

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

On March 10, 2017, President Trump asked forty-six United States Attorneys to resign.¹ On March 11, 2017, Preet Bharara was fired as the U.S. Attorney for the Southern District of New York after refusing to comply with the request to resign.² This came despite the fact that Mr. Bharara reported in November that he had been asked to stay on as the U.S. Attorney in the

¹ Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES, Mar. 10, 2017, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>.

² Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES, Mar. 11, 2017, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>; Marty Steinberg, *Top Cop of Wall Street, Preet Bharara, Fired After Refusing Trump's Call to Resign*, CNBC (Mar. 11, 2017, 4:42PM), <http://www.cnbc.com/2017/03/11/preet-bharara-says-he-was-fired-moments-ago.html>.



Trump administration.³ On March 17, 2017, *ProPublica* reported that prior to his firing, Mr. Bharara had been investigating allegations of insider trading by Tom Price, former Georgia congressman and current Secretary of the Department of Health and Human Services.⁴ American Oversight seeks records to determine whether Mr. Bharara’s investigation of Secretary Price, or any other member of the Trump administration or the Trump campaign, was a motivating factor in his firing.

Requested Records

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

1. All communications between DOJ—including the Office of the Attorney General, the Office of the Deputy Attorney General, and the Executive Office for United States Attorneys—and the White House regarding the request for Preet Bharara to resign as U.S. Attorney for the Southern District of New York or regarding his refusal to resign.
2. All communications between DOJ—including the Office of the Attorney General, the Office of the Deputy Attorney General, and the Executive Office for United States Attorneys—and the White House, regarding the decision to fire Preet Bharara as U.S. Attorney for the Southern District of New York.

Please provide all responsive records from November 9, 2016, to 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 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

³ Benjamin Weiser & Nick Corasaniti, *Preet Bharara Says He Will Stay On as U.S. Attorney Under Trump*, N.Y. TIMES, Nov. 30, 2016, https://www.nytimes.com/2016/11/30/nyregion/preet-bharara-says-he-will-stay-on-as-us-attorney-under-trump.html?_r=0.

⁴ Robert Faturechi, *Fired U.S. Attorney Preet Bharara Said to Have Been Investigating HHS Secretary Tom Price*, PROPUBLICA (Mar. 17, 2017, 2:13 PM), https://www.propublica.org/article/preet-bharara-fired-investigating-tom-price-hhs-stock-trading?utm_campaign=bt_twitter&utm_source=twitter&utm_medium=social.

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.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

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

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 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), 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 & 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>.

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

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, DOJ 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 DOJ 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

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)).

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

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).¹³

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.”¹⁴ 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.

Shortly after the election in November 2016, Preet Bharara, the U.S. Attorney for the Southern District of New York, reported that he had been asked by President-elect Trump to remain in that capacity under the new administration.¹⁵ Notwithstanding those reports, Mr. Bharara was one of forty-six U.S. Attorneys asked to resign by President Trump on March 10, 2017.¹⁶ And indeed, on March 11, 2017, after Mr. Bharara refused to resign, he announced that he had been fired.¹⁷ Shortly thereafter, *ProPublica* reported that prior to his firing, Mr. Bharara had been investigating allegations of insider trading by Tom Price, former Georgia congressman and current Secretary of the Department of Health and Human Services.¹⁸ This raises serious questions about whether Mr.

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

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

¹⁵ Benjamin Weiser & Nick Corasaniti, *Preet Bharara Says He Will Stay On as U.S. Attorney Under Trump*, N.Y. TIMES, Nov. 30, 2016, https://www.nytimes.com/2016/11/30/nyregion/preet-bharara-says-he-will-stay-on-as-us-attorney-under-trump.html?_r=0.

¹⁶ Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES, Mar. 10, 2017, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>.

¹⁷ Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES, Mar. 11, 2017, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>; Marty Steinberg, *Top Cop of Wall Street, Preet Bharara, Fired After Refusing Trump’s Call to Resign*, CNBC (Mar. 11, 2017, 4:42 PM), <http://www.cnbc.com/2017/03/11/preet-bharara-says-he-was-fired-moments-ago.html>.

¹⁸ Robert Faturechi, *Fired U.S. Attorney Preet Bharara Said to Have Been Investigating HHS Secretary Tom Price*, PROPUBLICA (Mar. 17, 2017, 2:13 PM),

Bharara's investigation of Secretary Price or other unreported investigations into the Trump administration or the Trump campaign motivated his firing. Disclosure of the requested information is therefore in the public interest because it would inform the public regarding potential interference with a federal investigation by the Trump administration.

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.

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 DOJ 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. There is widespread and exceptional media interest in Mr. Trump's demand that all holdover United States Attorneys resign *en masse*, rather than the more gradual changeover that often occurs under a new administration.¹⁹ In particular, the decision to fire Mr. Bharara as U.S. Attorney for the Southern District of New York after previously requesting that he remain has generated significant media interest.²⁰ The recent revelation that Mr. Bharara had been investigating a current Trump administration cabinet member prior to his unexpected firing lends greater urgency to the public's need to know the reason for Mr. Trump's

https://www.propublica.org/article/preet-bharara-fired-investigating-tom-price-hhs-stock-trading?utm_campaign=bt_twitter&utm_source=twitter&utm_medium=social.

¹⁹ See, e.g., Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES, Mar. 10, 2017,

<https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>.

²⁰ See, e.g., Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES, Mar. 11, 2017,

<https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html>; Marty Steinberg, *Top Cop of Wall Street, Preet Bharara, Fired After Refusing Trump's Call to Resign*, CNBC (Mar. 11, 2017, 4:42 PM), <http://www.cnbc.com/2017/03/11/preet-bharara-says-he-was-fired-moments-ago.html>; Benjamin Weiser & Nick Corasaniti, *Preet Bharara Says He Will Stay On as U.S. Attorney Under Trump*, N.Y. TIMES, Nov. 30, 2016,

https://www.nytimes.com/2016/11/30/nyregion/preet-bharara-says-he-will-stay-on-as-us-attorney-under-trump.html?_r=0.

sudden about face in regard to Mr. Bharara's continued employment as U.S. Attorney.²¹ This is self-evidently a matter "in which there exist possible questions about the government's integrity that affect public confidence."²²

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 Sara Creighton at 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,



Austin R. Evers
Executive Director
American Oversight

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

²¹ Robert Faturechi, *Fired U.S. Attorney Preet Bharara Said to Have Been Investigating HHS Secretary Tom Price*, PROPUBLICA (Mar. 17, 2017, 2:13 PM),

https://www.propublica.org/article/preet-bharara-fired-investigating-tom-price-hhs-stock-trading?utm_campaign=bt_twitter&utm_source=twitter&utm_medium=social.

²² 28 C.F.R. § 16.5(e)(1)(iv).