



March 29, 2017

VIA ONLINE REQUEST FORM

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Department of Justice
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Online Request via FOIAonline

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Valerie H. Yancey
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Department of Justice
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Re: Expedited Freedom of Information Act Request

Dear Ms. Day, Ms. Golden, and Ms. Yancey:

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

Last week, Devin Nunes, Chairman of the House Permanent Select Committee on Intelligence (House Intelligence Committee), cancelled a previously-planned open hearing into connections between Russian officials and Donald Trump's presidential campaign,¹ at which former acting

¹ Tom LoBianco & Manu Raju, *Partisan Split at House Intel Committee Over Canceled Open Hearing*, CNN POLITICS (Mar. 24, 2017, 4:51 PM), <http://www.cnn.com/2017/03/24/politics/devin-nunes-paul-manafort-house-intelligence/>.



attorney general Sally Yates was scheduled to testify.² On March 28, 2017, it was reported that Department of Justice (DOJ) officials had attempted to prevent Ms. Yates from testifying at that hearing on the grounds that all of her testimony would have been covered by the presidential communications privilege and/or the deliberative process privilege.³ As questions continue to arise about the ties between the Trump campaign and the Russian government,⁴ the American people deserve to know whether and how the Trump administration has been cooperating with—or obstructing—that investigation.

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. Any legal analysis provided to any member of the White House staff or used for discussions with the White House, including analysis, talking points, or background materials for such discussions, regarding any privilege or immunity issues in connection with any potential testimony or interview of former acting attorney general Sally Yates before the House Intelligence Committee or any other congressional committee.

Please provide all responsive records from January 30, 2017, 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,

² Max Greenwood, *Schiff: Yates Would Have Testified on Flynn at Cancelled Hearing*, THE HILL (Mar. 28, 2017, 1:00 PM), <http://thehill.com/policy/national-security/326135-schiff-yates-would-have-testified-on-flynn-at-cancelled-hearing>.

³ Devlin Barrett & Adam Entous, *Trump Administration Sought to Block Sally Yates from Testifying to Congress on Russia*, WASH. POST (Mar. 28, 2017, 9:56 AM), https://www.washingtonpost.com/world/national-security/trump-administration-sought-to-block-sally-yates-from-testifying-to-congress-on-russia/2017/03/28/82b73e18-13b4-11e7-9e4f-09aa75d3ec57_story.html?pushid=58da6ddf5ca9ee1d000000008&tid=notifi_push_breaking-news&utm_term=.59b0b29e18c2.

⁴ See, e.g., Margaret Hartmann, *What We Know About the Investigations Into Trump’s Russia Scandal*, N.Y. MAG. (Mar. 7, 2017), <http://nymag.com/daily/intelligencer/2017/03/what-we-know-about-the-probes-into-trumps-russia-scandal.html>.

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.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), <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>.

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 the Department 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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.”¹⁵ Allegations of Russian interference in the U.S. election and the Trump campaign’s closeness to Russian officials has been the subject of significant media coverage.¹⁶ Moreover, the FBI and several congressional committees have been investigating potential interference in the election by

¹³ 28 C.F.R. § 16.10(k)(1).

¹⁴ 28 C.F.R. § 16.10(k)(1).

¹⁵ 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)-(B).

¹⁶ David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, <https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html>; Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*, WASH. POST, Mar. 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html?utm_term=.991a450a2f5d; Jonathan Martin & Amy Chozick, *Donald Trump’s Campaign Stands By Embrace of Putin*, N.Y. TIMES, Sept. 8, 2016, <https://www.nytimes.com/2016/09/09/us/politics/hillary-clinton-donald-trump-putin.html>; Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, <https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html>; Seung Min Kim, *Sessions Won’t Recuse Himself from DOJ Trump Probes*, POLITICO (Jan. 23, 2017, 8:38 PM), <http://www.politico.com/story/2017/01/jeff-sessions-trump-probes-234087>; Faith Karimi, *What Jeff Sessions Said About Russia Ties During Confirmation Hearings*, CNN (Mar. 3, 2017, 11:42 AM) <http://www.cnn.com/2017/03/02/politics/russia-jeff-sessions-confirmation-hearing/>; Karen Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from Any Probe Related to 2016 Presidential Campaign*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_gopreax-840a%3Ahomepage%2Fstory&tid=ptv_rellink&utm_term=.8ad634d0414c.

the Russian government.¹⁷ As part of that investigation, the House Intelligence Committee had scheduled an open hearing on March 28, 2017, at which the former acting attorney general, Sally Yates, was scheduled to testify.¹⁸ After that hearing was cancelled, Ms. Yates's attorney reported that DOJ had attempted to prevent Ms. Yates from testifying at that hearing on the grounds that her testimony would have been covered by the presidential communications privilege and/or the deliberative process privilege.¹⁹

This request is primarily and fundamentally for non-commercial purposes.²⁰ 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 and promote their availability on social media platforms, such as Facebook and Twitter.²¹ One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its recently launched "Audit the Wall" effort, 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.

Application for Expedited Processing

¹⁷ See, e.g., Gabrielle Levy, *House Panel Probing Possible Links Between Russia, Trump Campaign*, U.S. NEWS & WORLD REP. (Jan. 25, 2017, 4:19 PM), <https://www.usnews.com/news/politics/articles/2017-01-25/house-intelligence-committee-investigating-possible-connections-between-russia-trump-campaign>; Matt Apuzzo et al., *FBI Is Investigating Trump's Russia Ties, Comey Confirms*, N.Y. TIMES, Mar. 20, 2017, <https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html>; Karoun Demirjian, *Senate Intelligence Committee to Start Russia Probe Interviews Next Week*, WASH. POST (Mar. 29, 2017, 5:15 PM), https://www.washingtonpost.com/powerpost/gop-lawmaker-senate-should-take-lead-on-congress-russia-investigation/2017/03/29/c31d0fb0-1485-11e7-ada0-1489b735b3a3_story.html?utm_term=.f6d53c781568.

¹⁸ Greenwood, *supra* note 2.

¹⁹ Barrett & Entous, *supra* note 3; Mike Levine, *Trump Admin Wanted to Curtail Former AG's Russia Testimony, Lawyer Alleges*, ABC NEWS (Mar. 18, 2017, 1:39 PM), <http://abcnews.go.com/Politics/house-intel-hearing-canceled-trump-admin-advised-planned/story?id=46421448>.

²⁰ 28 C.F.R. § 16.10(k)(2)(iii)(A)-(B).

²¹ American Oversight currently has over 9,600 followers on Facebook and over 7,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 28, 2017); American Oversight (@weareoversight), TWITTER (last visited Mar. 28, 2017).

²² *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org (last visited Mar. 28, 2017).

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 Department of Justice 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, there has been extensive media coverage of the possible ties between the Trump presidential campaign and the Russian government, as well as the current administration's efforts to investigate any such ties.²³ The recent cancellation of an open hearing into this issues, combined with reports of internal debate about the proper scope of testimony at that hearing, has generated additional interest.²⁴ The requested documents will shed light on these issues of considerable interest to the public, which undoubtedly constitute "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."²⁵

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

²³ See *supra* notes 16-17.

²⁴ See *supra* notes 18-19.

²⁵ 28 C.F.R. § 16.5(e)(1)(iv).