



April 28, 2017

**VIA ONLINE PORTAL**

Laurie Day  
Chief, Initial Request Staff  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Avenue NW, Suite 11050  
Washington, DC 20530-0001  
Via FOIAOnline

**Re: Freedom of Information Act Request**

Dear Ms. Day:

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

In the first weeks of the Trump administration, reports emerged regarding the use of private messaging apps by political appointees.<sup>1</sup> Following on that news, a reporter for Politico tweeted that DOJ's Director of Public Affairs, Sarah Isgur Flores, was corresponding with the media from her personal Gmail account.<sup>2</sup>

Everyone is harmed when officials improperly use private communication channels for public business. The public loses its right to a complete record of American history; Congress, the media, and inspectors general lose the raw material to conduct proper oversight; and agencies lose access to records of their own actions. American Oversight is therefore seeking records regarding Ms. Flores's compliance with records-retention laws and regulations.

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<sup>1</sup> Sheera Frenkel, *White House Staff Are Using a "Secure" App That's Really Not So Secure*, BUZZFEED NEWS (Feb. 16, 2017, 8:23 PM), [https://www.buzzfeed.com/sheerafrenkel/white-house-staff-are-using-a-secure-app-thats-really-not-so?utm\\_term=.oaALnvyRY](https://www.buzzfeed.com/sheerafrenkel/white-house-staff-are-using-a-secure-app-thats-really-not-so?utm_term=.oaALnvyRY);

Andrew Restuccia & Nancy Cook, *Trump Inspires Encryption Boom in Leaky D.C.*, POLITICO (Feb. 28, 2017, 11:54 AM), <http://www.politico.com/story/2017/02/trump-encryption-cybersecurity-leaks-235417>; Jonathan Swan & David McCabe, *Confide: The App for Paranoid Republicans*, AXIOS, Feb. 8, 2017, <https://www.axios.com/confide-the-new-app-for-paranoid-republicans-2246297664.html>.

<sup>2</sup> Edward-Isaac Dove ( @IsaacDovere), TWITTER (Mar. 1, 2017, 11:26 PM), <https://twitter.com/IsaacDovere/status/837157240599638016>; Edward-Isaac Dove ( @IsaacDovere), TWITTER (Mar. 1, 2017, 11:32 PM), <https://twitter.com/IsaacDovere/status/837158525533097984>.



## Requested Records

American Oversight requests that DOJ produce the following within twenty business days:

1. All communications with reporters from any personal email address belonging to Ms. Flores.
2. All communications regarding DOJ business conducted from any personal email address belonging to Ms. Flores or from any personal device belonging to Ms. Flores, including but not limited to text messages, voicemails, and encrypted messaging apps.
3. All emails or other communications forwarding or copying records from any personal email address belonging to Ms. Flores or from any personal device belonging to Ms. Flores to any official DOJ account belonging to Ms. Flores.
4. All calendar records evidencing that Ms. Flores has received training regarding the requirements of the Federal Records Act.
5. A copy of any training received by Ms. Flores regarding the requirements of the Federal Records Act.

Please provide all responsive records from January 20, 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, 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>3</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 official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**<sup>4</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 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.**<sup>5</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 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 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>6</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

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<sup>3</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).

<sup>4</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>5</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>6</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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>7</sup> 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.”<sup>8</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>9</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>10</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, 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 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 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

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

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

<sup>9</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>10</sup> *Mead Data Central*, 566 F.2d at 261.

significant way.<sup>11</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>12</sup>

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 or activities.<sup>13</sup> In light of the administration’s seemingly laissez-faire approach to records retention, Ms. Flores’s use of her personal email account for official business received media attention when the report first surfaced.<sup>14</sup> The use of non-governmental systems to conduct government business presents a serious risk that appointees will not comply with these statutory requirements for the preservation of federal and presidential records. In the absence of a well-established, systematic process to ensure that all presidential or agency communications on non-official electronic messaging accounts are copied or forwarded in complete form to official accounts consistent with the requirements of 44 U.S.C. § 2911, the use of personal email accounts or encrypted-communications applications to conduct official government business, whether done for convenience or with the intent to insulate communications from scrutiny now or in the future, presents a clear, *prima facie* circumvention of the law, including the Federal Records Act and the Freedom of Information Act. These statutes collectively establish a fundamental principle that the public owns and has a right to access government records. Unless preservation is evidenced in the records responsive to this request, the public can have no faith that the searchable public record is complete, or ever will be. In light of Ms. Flores’s purported use of personal emails for government business in the past, the requested records will provide the public with a window into the administration’s approach to federal recordkeeping requirements.

This request is primarily and fundamentally for non-commercial purposes.<sup>15</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 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.<sup>16</sup>

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<sup>11</sup> 28 C.F.R. § 16.10(k)(2).

<sup>12</sup> *Id.*

<sup>13</sup> 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)–(B).

<sup>14</sup> Jacob Brogan, *The DOJ’s Director of Public Affairs Used Gmail to Send a Work Email. Is That Legal?*, SLATE (Mar. 2, 2017, 2:00 PM), [http://www.slate.com/blogs/future\\_tense/2017/03/02/is\\_it\\_legal\\_to\\_use\\_a\\_private\\_gmail\\_account\\_for\\_government\\_business.html](http://www.slate.com/blogs/future_tense/2017/03/02/is_it_legal_to_use_a_private_gmail_account_for_government_business.html); Gianluca Messofiore, *Hillary Supporters Will Probably Get Pretty Angry After Reading This*, MASHABLE, Mar. 2, 2017, <http://mashable.com/2017/03/02/jeff-sessions-spokeswoman-gmail/#izx56CswbSqG>.

<sup>15</sup> 28 C.F.R. § 16.10(k)(iii)(A)–(B).

<sup>16</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 30,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 28, 2017).

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.<sup>17</sup>

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 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 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

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<sup>17</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).