



July 17, 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 Freedom of Information Officers:

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.

On July 11, 2017, Attorney General Sessions made off-camera remarks to a closed-door “Summit on Religious Liberty” event hosted by the Alliance Defending Freedom.¹ Although DOJ released transcripts of remarks the Attorney General made at other events on July 11 and 12, it declined to release transcripts of his remarks at the Alliance Defending Freedom event.² *The Federalist* posted a transcript of the remarks, which *NBC News* reported DOJ confirmed “was legitimate.”³ Yet DOJ itself still has not been forthcoming about the Attorney General’s participation in the event.

As Attorney General, Mr. Sessions is in charge of enforcing the nation’s federal civil rights laws, but his decision to participate in the Alliance Defending Freedom event—and the inexplicable

¹ Laura Jannet, *AG Sessions Under Fire for Closed-Door Speech to Alliance Defending Freedom*, CNN (July 13, 2017, 10:58 AM), <http://www.cnn.com/2017/07/12/politics/jeff-sessions-alliance-defending-freedom-summit/index.html>.

² *Here’s the Speech Jeff Sessions Delivered to Christian First Amendment Lawyers*, THE FEDERALIST, July 13, 2017, <http://thefederalist.com/2017/07/13/heres-the-speech-jeff-sessions-delivered-to-christian-first-amendment-lawyers/>; Pete Madden and Erin Galloway, *Jeff Sessions Addresses ‘Anti-LGBT Hate Group,’ But DOJ Won’t Release His Remarks* (July 12, 2017, 6:27 PM) <http://abcnews.go.com/Politics/jeff-sessions-addresses-anti-lgbt-hate-group-doj/story?id=48593488>.

³ Mary Emily O’Hara, *Jeff Sessions Tells ‘Hate Group’ DOJ Will Issue Religious Freedom Guidance*, NBC NEWS (July 13, 2017, 6:46 PM), <http://www.nbcnews.com/feature/nbc-out/jeff-sessions-tells-hate-group-doj-will-issue-religious-freedom-n782756>.



secrecy about his role in the event—reinforces longstanding concerns about his commitment to equal protection for all Americans.⁴ The Southern Poverty Law Center has identified the Alliance Defending Freedom as an anti-LGBT hate group that “specializes in supporting the recriminalization of homosexuality abroad, ending same-sex marriage, and generally making life as difficult as possible for LGBT communities in the U.S. and internationally.”⁵ Moreover, the transcript *The Federalist* posted indicated that DOJ will soon release guidance on federal religious liberty protections, which LGBTQ advocates fear will facilitate discrimination.⁶ DOJ’s furtiveness only enhances these concerns and obstructs public understanding in an area of grave concern to millions of Americans. American Oversight seeks documents that will shed light on the Attorney General’s participation in the Alliance Defending Freedom’s event.

Requested Records

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

1. Any talking points or prepared remarks provided to or used by the Attorney General in connection with his remarks at the July 11, 2017 Alliance Defending Freedom event.
2. Records reflecting background information prepared for or provided to Attorney General Sessions regarding the Alliance Defending Freedom generally or the July 11, 2017 event specifically. This request includes summaries, bullet points, or other work product prepared by DOJ, as well as third-party materials collected for use as background material.
3. All records relating to the Alliance Defending Freedom included in the Attorney General’s daily briefing books for July 10 and 11, 2017.
4. All communications between (a) the Attorney General or any political appointee or SES employee within either the Office of the Attorney General or the Office of Public Affairs and (b) any employee or representative of the Alliance Defending Freedom.
5. All records reflecting DOJ’s decision not to release publicly a transcript of the Attorney General’s remarks from the July 11, 2017 Alliance Defending Freedom’s event or a copy of the Attorney General’s prepared remarks for that event. This request includes all communications involving the Attorney General or any political appointee or SES employee within either the Office of the Attorney General or the Office of Public Affairs regarding a decision or direction not to release a transcript or copy of prepared remarks.

⁴ Adam Serwer, *Will Jeff Sessions Roll Back Civil-Rights Protections?*, THE ATLANTIC, Nov. 18, 2016, <https://www.theatlantic.com/politics/archive/2016/11/trumps-pick-for-attorney-general-foreshadows-a-civil-rights-rollback/508172/>.

⁵ *Alliance Defending Freedom*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

⁶ Mary Emily O’Hara, *Jeff Sessions Tells ‘Hate Group’ DOJ Will Issue Religious Freedom Guidance*, NBC NEWS (July 13, 2017, 6:46 PM), <http://www.nbcnews.com/feature/nbc-out/jeff-sessions-tells-hate-group-doj-will-issue-religious-freedom-n782756>.

For all requests other than Request 3, please provide all responsive records from February 8, 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.⁷ **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.**⁸

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**

⁷ 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).

⁸ 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)).

custodian-driven searches.⁹ 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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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.¹⁴ 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.

⁹ 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>.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹³ *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)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

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 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 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.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

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.”¹⁷ The requested records “direct[ly] and clear[ly]” concern “identifiable operations or activities” of the government, namely remarks by the nation’s top law enforcement official describing, among other topics, his views about religious liberty and forthcoming DOJ guidance on that topic.¹⁸ They will be “meaningfully informative” about the relationship between outside groups and government officials in connection with that guidance and other matters affecting civil rights and liberties—matters about which DOJ has been secretive to date.¹⁹ Finally, as described more fully below, American Oversight will use its public website and social media accounts to ensure that the requested material will “contribute to the understanding of a reasonably broad audience of persons interested” in the integrity of operations at the Department of Justice.²⁰

¹⁵ 28 C.F.R. § 16.10(k)(1).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 28 C.F.R. § 16.10(k)(2)(i).

¹⁹ 28 C.F.R. § 16.10(k)(2)(ii)(A).

²⁰ 28 C.F.R. § 16.10(k)(2)(ii)(B).

This request is primarily and fundamentally for non-commercial purposes.²¹ 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 promotes their availability on social media platforms, such as Facebook and Twitter.²² 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,²³ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁴ As another example, American Oversight's 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.²⁵

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 Beth France 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

²¹ 28 C.F.R. § 16.10(k)(2)(iii).

²² American Oversight currently has over 11,100 page likes on Facebook, and over 33,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 17, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 17, 2017).

²³ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²⁴ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²⁵ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.