



January 31, 2018

**VIA ELECTRONIC MAIL & ONLINE PORTAL**

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**Re: Freedom of Information Act Request**

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, 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 December 21, 2017, Attorney General Jeff Sessions announced that he had revoked twenty-five guidance documents interpreting federal law on a range of topics such as individuals with disabilities, fines and fees related to juveniles, and procedures related to the Voting Rights Act.<sup>1</sup> *The New York Times* reported that Mr. Sessions had appointed Associate Attorney General Rachel L. Brand to lead a regulatory reform task force to identify guidance documents for rescission.<sup>2</sup> Additionally, in a

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<sup>1</sup> Press Release, Dep't of Justice Office of Pub. Affairs, Attorney General Jeff Sessions Rescinds 25 Guidance Documents (Nov. 17, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents> [hereinafter *November Press Release*].

<sup>2</sup> See Charlie Savage, *Justice Dept. Revokes 25 Legal Guidance Documents Dating to 1975*, N.Y. TIMES, Dec. 21, 2017, <https://www.nytimes.com/2017/12/21/us/politics/justice-dept-guidance-documents.html>; see also David Shortell & Jessica Schneider, *Justice Department Rolls Back*



November 17, 2017 memorandum that Mr. Sessions issued, he took the position that in the past DOJ and other agencies had issued guidance documents without following the rulemaking process.<sup>3</sup> In a public press release, Mr. Sessions included a quote from Ms. Brand that she and her task force team “will proactively work to rescind existing guidance documents that go too far.”<sup>4</sup>

Below is a list of guidance documents enumerated in the November Press Release and rescinded since Mr. Sessions was appointed Attorney General:

- a. ATF Procedure 75-4;
- b. Industry Circular 75-10;
- c. ATF Ruling 85-3;
- d. Industry Circular 85-3;
- e. ATF Ruling 2001-1;
- f. ATF Ruling 2004-1;
- g. Southwest Border Prosecution Initiative Guidelines (2013);
- h. Northern Border Prosecution Initiative Guidelines (2013);
- i. Juvenile Accountability Incentive Block Grants Program Guidance Manual (2007);
- j. Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles (January 2017);
- k. Dear Colleague Letter on Enforcement of Fines and Fees (March 2016);
- l. ADA Myths and Facts (1995);
- m. Common ADA Problems at Newly Constructed Lodging Facilities (November 1999);
- n. Title II Highlights (last updated 2008);
- o. Title III Highlights (last updated 2008);
- p. Commonly Asked Questions About Service Animals in Places of Business (July 1996);
- q. ADA Business Brief: Service Animals (April 2002);
- r. Prior Joint Statement of the Department of Justice and the Department of Housing and Urban Development Group Homes, Local Land Use, and the Fair Housing Act (August 18, 1999);
- s. Letter to Alain Baudry, Esq., with standards for conducting internal audit in a non-discriminatory fashion (December 4, 2009);
- t. Letter to Esmeralda Zendejas on how to determine whether lawful permanent residents are protected against citizenship status discrimination (May 30, 2012);

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*Guidance on Fining Poor Defendants*, CNN (Dec. 22, 2017 8:36 PM), <http://www.cnn.com/2017/12/22/politics/doj-rescinds-guidance-memos/index.html>.

<sup>3</sup> Memorandum from Att’y Gen. to All Components of the Dep’t of Justice (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.

<sup>4</sup> Press Release, Department of Justice: Office of Public Affairs, Attorney General Jeff Sessions Ends the Department’s Practice of Regulation by Guidance (Nov. 17, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance>

- u. Common ADA Errors and Omissions in New Construction and Alterations (June 1997);
- v. Common Questions: Readily Achievable Barrier Removal and Design Details: Van Accessible Parking Spaces (August 1996);
- w. Website guidance on bailing-out procedures under section 4(b) and section 5 of the Voting Rights Act (2004);
- x. Americans with Disabilities Act Questions and Answers (May 2002);
- y. Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C. to State and Local Governments' Employment Service Systems for Individuals with Disabilities* (October 31, 2016).<sup>5</sup>

DOJ has failed to provide any rationale or justification for rescinding the twenty-five guidance documents listed above offering only general explanations that they go too far and are contrary to the law. American Oversight requests records to shed light on the process behind and rationales used to justify their rescission.

### **Requested Records**

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

All communications (including emails, internal announcements, or other correspondence) sent and received by any individuals listed below regarding how the regulatory reform task force was created and how members were selected to staff it:

- a. Any political appointee or SES employee in the Office of the Inspector General (OIG);
- b. Any political appointee or SES employee in the Office of the Deputy Attorney General (ODAG);
- c. Any political appointee or SES employee in the Office of the Associate Attorney General (OASG);
- d. Any other member of the regulatory reform task force.

Please provide all responsive records from January 20, 2017, through 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 DOJ 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.

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<sup>5</sup> See *November Press Release*, *supra* note 1.

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>6</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>7</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>8</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

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<sup>6</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>7</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>8</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>.

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>9</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 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>10</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>11</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>12</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>13</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

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<sup>9</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>10</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>11</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

<sup>12</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>13</sup> *Mead Data Central*, 566 F.2d at 261.

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 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.<sup>14</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>15</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 and activities.<sup>16</sup> The requested records will help American Oversight and the general public understand the process by which DOJ has and continues to rescind guidance documents that it deems “go too far.”<sup>17</sup> Disclosure of the requested information is likely to contribute significantly to public understanding on DOJ’s rationales and justifications behind rescinding these guidance documents. This information would significantly enhance the public’s knowledge of how their home states and local entities such as schools, housing authorities, and juvenile facilities interpret and enforce federal laws that have tangible impacts on their lives.<sup>18</sup> American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. The subject of this request is a matter of public interest, and American Oversight would make these records publicly available.

This request is primarily and fundamentally for non-commercial purposes.<sup>19</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 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.<sup>20</sup> American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example,

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<sup>14</sup> 28 C.F.R. § 16.10(k)(1).

<sup>15</sup> *Id.*

<sup>16</sup> 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

<sup>17</sup> *See November Press Release, supra* note 1.

<sup>18</sup> *See Shortell & Schneider, supra* note 2.

<sup>19</sup> 28 C.F.R. § 16.10(k)(iii)(A)–(B).

<sup>20</sup> American Oversight currently has approximately 11,800 page likes on Facebook, and 39,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 30, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 30, 2018).

after receiving records regarding an ethics waiver received by a senior DOJ attorney,<sup>21</sup> 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.<sup>22</sup> As another example, American Oversight 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.<sup>23</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 DOJ 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 Pooja Chaudhuri at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.897.3918. 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

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<sup>21</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>22</sup> *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>.

<sup>23</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).