



March 26, 2018

**VIA ONLINE PORTAL AND ELECTRONIC MAIL**

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  
Online Request via FOIAonline

Hirsh D. Kravitz  
FOIA, Records, and E-Discovery Office  
Civil Division  
Department of Justice  
Room 8314  
1100 L Street NW  
Washington, DC 20530-0001  
[civil.routing.FOIA@usdoj.gov](mailto:civil.routing.FOIA@usdoj.gov)

Nelson D. Hermilla, Chief  
FOIA/PA Branch  
Civil Rights Division  
Department of Justice  
BICN Bldg., Room 3234  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
[CRT.FOIArequests@usdoj.gov](mailto:CRT.FOIArequests@usdoj.gov)

**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.

The current administration has adopted a draconian approach to immigration enforcement. For example, on September 5, 2017, the president announced an end to the Deferred Action for Childhood Arrivals program, putting the futures of hundreds of thousands of young people in jeopardy unless Congress acted—which it has not.<sup>1</sup> Media reports also detail indiscriminate raids

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<sup>1</sup>Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES, Sept. 5, 2017, <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>; Ali Rogin & Mariam Khan, *Dreamers Deferred as Congress Lets DACA Deadline Pass*, ABC NEWS (Mar. 5, 2018, 5:47 AM), <http://abcnews.go.com/Politics/dreamers-deferred-congress-lets-daca-deadline-pass/story?id=53464924>.



and arrests that have ensnared valued community members and taken children from their parents.<sup>2</sup> And the president and the attorney general have threatened or adopted a variety of pressure tactics—including a recent lawsuit against the State of California—to pressure states and localities to abandon so-called “sanctuary” policies and yield to aggressive federal enforcement.<sup>3</sup>

State elected officials play a critical role in immigration policy. They influence the manner and degree of state cooperation with federal enforcement activities, and they advocate for changes to federal priorities and tactics. American Oversight seeks records that will shed light on the relationships between key federal and state officials in this critical area.

### **Requested Records**

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

All records reflecting communications (including but not limited to emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, or meeting agendas) between anyone listed in Column A below and anyone listed in Column B below, relating to immigration enforcement (including but not

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<sup>2</sup> Patricia Mazzei, *Immigration Agents Target 7-Eleven Stores in Push to Punish Employers*, N.Y. TIMES, Jan. 10, 2018, <https://www.nytimes.com/2018/01/10/us/7-eleven-raids-ice.html>; Nick Miroff, *Immigration Agents Target 7-Eleven Stores in Nationwide Sweep*, MIAMI HERALD, Jan. 10, 2018, <http://www.miamiherald.com/news/local/immigration/article194038649.html>; Hamed Aleaziz, *ICE Confirms 150-plus Arrests in California Sweep, Slams Schaaf's Early Warning*, SF GATE (Feb. 28, 2018, 7:51 AM), <https://www.sfgate.com/bayarea/article/Reports-of-California-immigration-sweep-are-true-12714833.php>; Aric Chokey, *Border Patrol Officers Get on Greyhound Bus to Ask for ID, then Arrest Woman*, SUN SENTINEL (Jan. 22, 2018, 7:25 PM), <http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-reg-greyhound-border-patrol-20180121-story.html>; Jeff Lennox & Katrina Bush, *Immigrant Raid on Greyhound Bus Ends in Passenger Deportation*, WSVN 7NEWS (Jan. 22, 2018), <https://wsvn.com/news/local/immigrant-raid-on-greyhound-bus-ends-in-passenger-deportation/>; Samantha Schmidt, *ICE Releases Mother It Detained for Months Far Away From 7-Year-Old Daughter*, WASH. POST, Mar. 7, 2018, [https://www.washingtonpost.com/news/morning-mix/wp/2018/03/07/ice-releases-mother-it-detained-four-months-far-away-from-7-year-old-daughter/?utm\\_term=.cb3a6cf7a38d](https://www.washingtonpost.com/news/morning-mix/wp/2018/03/07/ice-releases-mother-it-detained-four-months-far-away-from-7-year-old-daughter/?utm_term=.cb3a6cf7a38d).

<sup>3</sup> Tal Kopan, *Jeff Sessions Takes Immigration Fight to California, Announces Lawsuit*, CNN (Mar. 7, 2018, 5:37 PM), <https://www.cnn.com/2018/03/07/politics/jeff-sessions-california-sanctuary-cities-lawsuit/index.html>; Nicole Rodriguez, *Trump Administration Wants to Arrest Mayors of 'Sanctuary Cities'*, NEWSWEEK (Jan. 16, 2018, 5:21 PM), <http://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010>; Kevin Johnson & Gregory Korte, *DOJ Threatens 'Sanctuary Cities' With Subpoenas, Escalating Trump's Immigration Enforcement Campaign*, USA TODAY (Jan. 24, 2018, 12:00 PM), <https://www.usatoday.com/story/news/politics/2018/01/24/justice-department-threatens-sanctuary-cities-subpoenas-escalating-trumps-immigration-enforcement-ca/1061225001/>.

limited to immigration-related raids, detentions of individuals or families, or deportations), Deferred Action for Childhood Arrivals (DACA), border protection, sanctuary city policies, or potential or actual changes to federal immigration policy or practices. This request encompasses communications involving or relating to proposed or actual federal legislative or executive policy or action, including but not limited to legislation, guidance documents, white papers, policy statements, statements of principles, talking points, decision memoranda, and directives, whether in draft or final form.

DOJ should search for records from September 5, 2017, to the date of the search.

Column A	Column B
<ul style="list-style-type: none"> <li>• Attorney General Jeff Sessions</li> <li>• Deputy Attorney General Rod Rosenstein</li> <li>• Former Associate Attorney General Rachel Brand</li> <li>• Assistant Attorney General for the Civil Division Joseph Hunt</li> <li>• Assistant Attorney General for the Civil Rights Division Eric Dreiband</li> <li>• All other political appointees* within the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, or the Civil Rights Division.</li> <li>• Any other person acting on behalf of anyone listed above (such as an administrative assistant or chief of staff)</li> </ul>	<ul style="list-style-type: none"> <li>• Nathan Deal, Governor of Georgia</li> <li>• Office of the Governor of Georgia (gov.georgia.gov, state.ga.us)</li> <li>• Pam Bondi, Attorney General of Florida</li> <li>• Office of the Attorney General of Florida (myfloridalegal.com)</li> <li>• Rick Snyder, Governor of Michigan</li> <li>• Office of the Governor of Michigan (michigan.gov, state.mi.us)</li> <li>• Paul LePage, Governor of Maine</li> <li>• Office of the Governor of Maine (maine.gov, state.me.us)</li> </ul>

\*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

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.

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>4</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>5</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>6</sup> Furthermore, agencies that have adopted the National Archives and

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<sup>4</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>5</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>6</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

**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>7</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>8</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>9</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>10</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>11</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.

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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>7</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>8</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>9</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>10</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>11</sup> *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.<sup>12</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>13</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 the operations or activities of the government.”<sup>14</sup> There is significant public interest in how states influence DOJ’s policies with regard to immigration and how states interact with federal officials implementing those policies and engaging in official activities.<sup>15</sup> These records have the potential to shed significant light on any communications between state elected officials and DOJ related to immigration enforcement and border security, including the scope of state cooperation with federal immigration enforcement activities, federal pressure exerted on state officials, and advocacy efforts between these levels of government. As discussed below, American Oversight has the capacity and intention to inform a broad audience of interested persons about the government activities that are the subject of these records.

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<sup>12</sup> 28 C.F.R. § 16.10(k)(2).

<sup>13</sup> *Id.*

<sup>14</sup> 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)-(B).

<sup>15</sup> See Kopan, *supra* note 3; Rodriguez, *supra* note 3; Johnson & Korte, *supra* note 3.

This request is primarily and fundamentally for non-commercial purposes.<sup>16</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 promote their availability on social media platforms, such as Facebook and Twitter.<sup>17</sup> 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, American Oversight promptly posted the records to its website<sup>18</sup> and published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>19</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>20</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 Beth France at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.869.2465. 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,



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<sup>16</sup> 28 C.F.R. § 16.10(k)(iii)(A)-(B).

<sup>17</sup> American Oversight currently has approximately 11,800 page likes on Facebook, and 40,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 20, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 20, 2018).

<sup>18</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>19</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>20</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

Austin R. Evers  
Executive Director  
American Oversight