



July 17, 2018

**VIA ONLINE PORTAL & ELECTRONIC MAIL**

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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 June 10, 2018, NPR reported the existence of a July 21, 2017 email from Kansas Secretary of State Kris Kobach to Wendy Teramoto, chief of staff to the Secretary of Commerce, advocating for the inclusion of a question about U.S. citizenship on the 2020 Census at the apparent direction of then-White House strategist Steve Bannon.<sup>1</sup> Secretary Kobach had previously been appointed by President Donald Trump as the vice chairman of the Presidential Advisory Commission on Election Integrity, another illustration of his influence in the administration.<sup>2</sup> Given Secretary

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<sup>1</sup> See Hansi Lo Wang, *Documents Shed Light on Decision to Add Census Citizenship Question*, NPR (June 10, 2018, 1:00 AM), <https://www.npr.org/2018/06/10/618567462/documents-shed-light-on-decision-to-add-census-citizenship-question>.

<sup>2</sup> See Julie Hirschfeld Davis, *Trump Picks Voter ID Advocate for Election Fraud Panel*, N.Y. TIMES, May 11, 2017, <https://www.nytimes.com/2017/05/11/us/politics/trump-voter-fraud.html>.



Kobach's well-documented history of attempting to influence state and federal policy on the issues of voting rights and immigration,<sup>3</sup> the extent of his influence within the Department of Justice is a matter of substantial public interest.

### Requested Records

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

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between Department of Justice employees and Kansas Secretary of State Kris Kobach (including but not limited to emails sent to or received from [kkobach@gmail.com](mailto:kkobach@gmail.com), [kris@kriskobach.com](mailto:kris@kriskobach.com), or any email addresses has ending in @ks.gov).

DOJ may limit its search to all political appointees in the following offices:

- a. The Office of the Attorney General;
- b. The Office of the Deputy Attorney General;
- c. The Office of the Associate Attorney General;
- d. The Office of Legislative Affairs;
- e. The Office of the Solicitor General;
- f. The Office of Legal Counsel; and
- g. The Civil Rights Division.

Please provide all responsive records from January 20, 2017 to the date the search is conducted.

\*"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.

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

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<sup>3</sup> See, e.g., Jonathan Blitzer, *Trump's Ideas Man for Hard-Line Immigration Policy*, THE NEW YORKER, Nov. 22, 2016, <https://www.newyorker.com/news/news-desk/trumps-ideas-man-for-hard-line-immigration-policy>.

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 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

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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 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).

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.

**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.

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<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.

## 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 operations or activities of the government.”<sup>14</sup> The requested records are directly related to the work of DOJ. The disclosure of the information sought under this request will document and reveal the activities of the federal government, including whether and to what extent Secretary Kobach has exercised influence within the Department of Justice with respect to the 2020 Census.<sup>15</sup> In this case, disclosures of the requested information would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as demonstrated by the significant interest in the subject matter of this request.<sup>16</sup> American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. As noted, the subject of this request is a matter of public interest, and the public’s understanding of the government’s activities would be enhanced through American Oversight’s analysis and publication 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 Hansi Lo Wang, *Documents Shed Light On Decision To Add Census Citizenship Question*, NPR (June 10, 2018, 1:00 AM), <https://www.npr.org/2018/06/10/618567462/documents-shed-light-on-decision-to-add-census-citizenship-question>.

<sup>16</sup> See, e.g., Tara Bahrapour, *Commerce secretary suggested citizenship question to Justice Dept., according to memo, contradicting his congressional testimony*, WASH. POST, June 22, 2018, [https://www.washingtonpost.com/local/social-issues/memo-from-commerce-secretary-seems-to-contradict-his-testimony-on-census-citizenship-question/2018/06/22/4a324666-7658-11e8-9780-b1dd6a09b549\\_story.html?utm\\_term=.0198076e0dac](https://www.washingtonpost.com/local/social-issues/memo-from-commerce-secretary-seems-to-contradict-his-testimony-on-census-citizenship-question/2018/06/22/4a324666-7658-11e8-9780-b1dd6a09b549_story.html?utm_term=.0198076e0dac); Jacqueline Thomsen, *Census Bureau’s chief scientist warned secretary in memo against adding citizenship question*, THE HILL (June 10, 2018, 7:55 AM), <http://thehill.com/homenews/administration/391527-census-bureau-official-warned-in-memo-against-adding-citizenship>; Liz Robbins & Katie Benner, *Documents Show Political Lobbying in Census Question About Citizenship*, N.Y. TIMES, June 9, 2018, <https://www.nytimes.com/2018/06/09/nyregion/kobach-bannon-lobbying-census-question-on-citizenship-documents.html>; see also Bryan Lowry, *That citizenship question on the 2020 Census? Kobach says he pitched it to Trump*, KANSAS CITY STAR, (Mar. 27, 2018, 2:01 PM), <https://www.kansascity.com/news/politics-government/article207007581.html>.

This request is primarily and fundamentally for non-commercial purposes.<sup>17</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>18</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,<sup>19</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>20</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>21</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, Katherine Anthony 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.

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<sup>17</sup> 28 C.F.R. § 16.10(k)(iii)(A)-(B).

<sup>18</sup> American Oversight currently has approximately 11,900 page likes on Facebook, and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 16, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 16, 2018).

<sup>19</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>20</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>21</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left of the first letter.

Austin R. Evers  
Executive Director  
American Oversight