



August 10, 2018

**VIA Online Portal & Electronic Mail**

Douglas Hibbard  
Chief, Initial Request Staff  
Office of Information Policy  
Department of Justice  
1425 New York Avenue NW  
Suite 11050  
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Via FOIAOnline

Dorothy Lee  
Office of Justice Programs  
Office of the General Counsel  
Attention: FOIA Staff  
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Washington, DC 20531  
202-307-0790  
E-mail: [FOIAOJP@usdoj.gov](mailto:FOIAOJP@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.

On April 11, 2018, DOJ published a proposed revision to the National Crime Victimization Survey, recommending changing “the minimum age at which respondents will be administered questions on their sexual orientation and gender identity, raising the minimum age from 16 to 18.”<sup>1</sup> Advocates indicate that DOJ’s Bureau of Justice Statistics has been a leader on collecting data concerning the LGBTQ community, a population subject to a high level of hate crimes and violence.<sup>2</sup> American Oversight seeks records that have the potential to shed light on the decision-

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<sup>1</sup> Comments Requested: National Crime Victimization Survey, 83 Fed. Reg. 15,634 (Apr. 11, 2018).

<sup>2</sup> See, e.g., *DOJ Proposes Roll Back of Data Collection on Crime Victimization of LGBT Youth*, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, Apr. 11, 2018,



making process behind a policy change decreasing the data collected concerning LGBTQ youths, who may be particularly susceptible to crime victimization.<sup>3</sup>

### **Requested Records**

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

Any of the following records relating to the decision to revise the National Crime Victimization Survey (NCVS) changing “the minimum age at which respondents will be administered questions on their sexual orientation and gender identity, raising the minimum age from 16 to 18,” as published in the Federal Register on April 11, 2018:

1. All communications concerning the decision, its approval, or its rationale;
2. Any communications with any person or entity outside the executive branch relating to NCVS questions concerning sexual orientation and gender identity;
3. Any decision memoranda relating to the decision;
4. Advice or analysis prepared in connection with the decision; and
5. Any other record documenting the decision, its approval, or its rationale.

Please provide all responsive records from January 1, 2018, through April 30, 2018.

American Oversight requests that DOJ search, at a minimum, the following offices and individuals for records responsive to this request:

1. The Office of the Attorney General (search may be limited to political appointees\*)
2. The Office of the Deputy Attorney General (search may be limited to political appointees)
3. The Office of the Associate Attorney General (search may be limited to political appointees)
4. The Office of Legal Policy
5. The following offices and individuals at the Office of Justice Programs:
  - a. The immediate office of the Assistant Attorney General, Office of Justice Programs
  - b. The immediate office of the Principal Deputy Assistant Attorney General, Office of Justice Programs
  - c. The Director, Bureau of Justice Statistics

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<https://williamsinstitute.law.ucla.edu/press/press-releases/doj-proposes-roll-back-of-data-collection-on-crime-victimization-of-lgbt-youth/>.

<sup>3</sup> See, e.g., John Paul Brammer, *Justice Department Wants to Remove Questions for LGBTQ Teens from Crime Survey*, NBC NEWS (Apr. 23, 2018, 1:56 PM),

<https://www.nbcnews.com/feature/nbc-out/justice-department-wants-remove-questions-lgbtq-teens-crime-survey-n865361>.

d. The Deputy Director, Bureau of Justice Statistics

American Oversight requests that DOJ search for records of all individuals who held the above-listed positions during the relevant time period, whether in an acting or permanent capacity.

DOJ should also search other offices that it determines are likely to have records responsive to this request.

\*“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, any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments, or any career employee first detailed to a leadership or front office after January 20, 2018.

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 are 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**

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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).

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 Administration (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

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<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).

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.

### **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>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.

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 government operations and activities.<sup>14</sup> The NCVS, administered annually since 1973, “is one of the main sources of data on crime.”<sup>15</sup> Given LGBTQ individuals’—and particularly LGBTQ youths’—increased vulnerability to crime, collecting this data “is vital for informing policy related to all forms of violence in ensuring that victims, even youth, can access support.”<sup>16</sup> There has been significant public interest in the administration’s apparent attempts to erase LGBTQ individuals from federal data collection, and the public deserves to know the rationale behind such policy decisions.<sup>17</sup> As discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.<sup>18</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>19</sup> American

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<sup>12</sup> 28 C.F.R. § 16.10(k)(1).

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

<sup>14</sup> 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

<sup>15</sup> *See* Brammer, *supra* note 3.

<sup>16</sup> *See id.*

<sup>17</sup> *See, e.g.,* WILLIAMS INSTITUTE, *supra* note 2; Brammer, *supra* note 3; *DOJ Accused of ‘Erasing LGBTQ Teens from Crime Survey*, THE CRIME REPORT, Apr. 24, 2018, <https://thecrimereport.org/2018/04/24/doj-accused-of-erasing-lgbtq-teens-from-crime-survey/>; *Trump Administration Continues Erasing LGBTQ People in Data Collection*, ANTI-VIOLENCE PROJECT, Apr. 13, 2018, <https://avp.org/words-matter-2/>; Sarah Kate Ellis, *President Trump is Trying to Erase the LGBTQ Community*, TIME, Jan. 16, 2018, <http://time.com/5104657/donald-trump-lgbt-rights>; M.J. Murphy, *Trump’s Erasure of LGBT People*, MEDIUM, May 19, 2018, <https://medium.com/th-ink/trumps-erasure-of-lgbt-people-761ebaf611a5>; *see also, e.g.,* Mary Emily O’Hara, *Trump Administration Removes LGBTQ Questions from Elderly Survey*, NBC NEWS (Mar. 20, 2017, 2:20 PM), <https://www.nbcnews.com/feature/nbc-out/trump-administration-removes-lgbtq-questions-elderly-survey-n735741>; Nick Duffy, *CDC Rolling Back Data Collection About LGBT People’s Health*, PINK NEWS (May 18, 2018, 7:52 PM), <https://www.pinknews.co.uk/2018/05/18/cdc-rolling-back-data-collection-on-lgbt-health/>;

<sup>18</sup> 28 C.F.R. § 16.10(k)(1), (2)(iii).

<sup>19</sup> American Oversight currently has approximately 11,900 page likes on Facebook and 44,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/>

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>20</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>21</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>22</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 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.

Sincerely,



Austin R. Evers  
Executive Director  
American Oversight

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(last visited August 10, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited August 10, 2018).

<sup>20</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>21</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>22</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.