



August 29, 2018

VIA ELECTRONIC MAIL

FOIA Officer
National Archives and Records Administration
8601 Adelphi Road, Room 3110
College Park, MD 20740
foia@nara.gov

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

On August 28, 2018, *The New York Times* reported that a copy of former Central Intelligence Agency (CIA) officer and current congressional candidate Abigail Spanberger's security clearance application form was obtained by a Republican super PAC, the Congressional Leadership Fund, and is now being used for political purposes. The super PAC claims the document was obtained through a FOIA request filed by a Republican-aligned research firm, America Rising, and was processed by the National Archives and Records Administration (NARA) and the United States Postal Service (USPS).¹

American Oversight seeks records to determine whether federal government decisions and activities related to the processing of FOIA requests have been influenced by partisan political considerations.

Requested Records

American Oversight requests that NARA produce the following within twenty business days and seeks expedited review of this request for reasons identified below:

- 1.) All processing notes related to any FOIA request—including the release of responsive records—filed by America Rising, the Congressional Leadership Fund, or any other

¹ Michael Tackett, *C.I.A. Officer-Turned-Candidate Says PAC Obtained Her Security Application*, N.Y. TIMES, Aug. 28, 2018, <https://www.nytimes.com/2018/08/28/us/politics/cia-officer-house-election-super-pac.html>; Grace Wyler & Jason Leopold, *In Unprecedented Move, the US Postal Service Released a Former CIA Officer's Security Application to a Republican Group*, BUZZFEEDNEWS (Aug. 29, 2018, 4:08 AM), <https://www.buzzfeednews.com/article/gracewyler/usps-releases-cia-officer-security-clearance-application>.



individual or entity, regarding Abigail Spanberger and her work history, personnel forms, and security clearance processing forms, including the SF-86.

Please provide all responsive records from July 10, 2017, through the date of the search.

- 2.) All processing notes related to any Privacy Act request—including the release of responsive records—regarding Abigail Spanberger and her work history, personnel forms, and security clearance processing forms, including the SF-86.

Please provide all responsive records from July 10, 2017, through the date of the search.

- 3.) All records reflecting communications (including emails, email attachments, text messages, voicemail transcripts, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook Messenger, Twitter Direct Messages, or Signal), telephone call logs, calendar invitations, calendar 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) related to any FOIA request filed by America Rising, the Congressional Leadership Fund, or any other individual or entity, regarding Abigail Spanberger and her work history, personnel forms, and security clearance processing forms, including the SF-86.

Please provide all responsive records from July 10, 2017, through the date of the search.

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 are subject to

the Federal Records Act and FOIA.² **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.**³

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 your agency’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.**⁴ 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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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.”⁵ 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

² 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).

³ 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)).

⁴ 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>.

⁵ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.”⁶ 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.”⁷ 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.’”⁸

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.⁹ 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, you are 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 hopes to 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 your agency’s implementing regulations, 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

⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

⁸ *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)).

⁹ *Mead Data Central*, 566 F.2d at 261.

will likely contribute to public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 activities of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how a federal government agency processes FOIA requests for records containing sensitive personal information of a candidate for federal office when that request is made by a group with a partisan political affiliation.¹⁰ The disclosure of the requested information also has the potential to show whether federal agencies have been influenced by political considerations into disregarding the requirements of the Privacy Act.¹¹ The American people deserve to know if partisan, political considerations at federal agencies have led to improper processing of FOIA requests with the potential to influence the outcome of rapidly approaching congressional elections. As discussed below, American Oversight has the ability and intent to disseminate the requested information to the public.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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.¹² 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,¹³ 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.¹⁴ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and

¹⁰ See Tackett, *supra* note 1; Wyler & Leopold, *supra* note 1.

¹¹ *Id.*

¹² American Oversight currently has approximately 11,900 page likes on Facebook and 44,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited August 29, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited August 29, 2018).

¹³ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁴ *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>.

commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.¹⁵

Accordingly, American Oversight qualifies for a fee waiver.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and your agency's implementing regulations, American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. 5 U.S.C. § 552(a)(6)(E)(1). Specifically, I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the processing of FOIA (or potentially improper Privacy Act) requests related to now-congressional candidate Abigail Spanberger's personnel files as a political organization has used sensitive personal information, purportedly gained from FOIA requests, to affect the outcome of a congressional election. Expert commenters have noted that such information is rarely, if ever, permissibly disclosed in response to a FOIA request.¹⁶ The American people urgently need to know whether partisan political considerations have caused federal agencies to act improperly in order to influence congressional elections. Moreover, the information American Oversight seeks concerns "a matter of a current exigency to the American public"¹⁷ because the American people urgently need to know whether federal agencies have acted improperly for partisan political advantage *before* the rapidly approaching congressional elections on November 6, 2018.

I further certify that American Oversight is primarily engaged in disseminating information to the public.¹⁸ 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁹ American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."²⁰ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social

¹⁵ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

¹⁶ See Wyler & Leopold, *supra* note 1.

¹⁷ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3469).

¹⁸ 5 U.S.C. § 552(a)(6)(E)(1).

¹⁹ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

²⁰ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

media platforms, such as Facebook and Twitter.²¹ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²²

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency 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 Dan McGrath at foia@americanoversight.org or (202) 897-4213. 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 American Oversight currently has approximately 11,900 page likes on Facebook and 44,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited August 29, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited August 29, 2018).

²² See *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.