



November 9, 2017

**VIA FACSIMILE**

U.S. Department of State  
Office of Information Programs and Services  
A/GIS/IPS/RL  
SA-2, Suite 8100  
Washington, DC 20522-0208  
FAX: (202) 261-8579

**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 *et seq.* and the implementing regulations of the Department of State (State), 22 C.F.R. Part 171, American Oversight makes the following request for records.

Numerous news reports have emerged that since 2016, more than twenty (some news outlets suggest over fifty) American diplomats and their families have experienced medically confirmed physical and psychological damage caused by exposure to certain sound frequencies when they were in Cuba.<sup>1</sup> The most recent incident reportedly occurred in August 2017.<sup>2</sup> Investigators reportedly suspect that these sound frequencies may be a “sonic weapon” being used to target U.S. personnel in particular.<sup>3</sup> U.S. officials have not disclosed any reason, or impetus behind who is targeting and why they would attempt to injure U.S. personnel in Cuba.<sup>4</sup>

Various accounts suggest that exposure to sound frequencies has caused severe hearing, cognitive, visual, balance and sleep problems.<sup>5</sup> According to news sources, affected individuals have stated that they heard a mixture of high frequency noise at various lengths and pulses akin to the sound of

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<sup>1</sup> Josh Lederman & Michael Weissenstein, *This Is The Sound American Diplomats Heard During Sonic Attacks In Cuba*, TIME, Oct. 12, 2017, <http://time.com/4980386/cuban-sound-attacks-recording-sonic/>; Mark Moore, *US Diplomats In Cuba Suffered ‘Brain Injuries’ In Sonic Attack*, N.Y. POST (Aug. 23, 2017 3:56 PM), <http://nypost.com/2017/08/23/us-diplomats-suffering-from-brain-injuries-after-possible-acoustic-attack/>.

<sup>2</sup> Lederman & Weissenstein, *supra* note 1.

<sup>3</sup> Zachary Cohen, *New Audio Adds to Mystery of Attacks On US Diplomats*, CNN (Oct. 14, 2017 12:33 PM), <http://www.cnn.com/2017/10/13/politics/cuba-us-diplomats-acoustic-weapons/index.html>.

<sup>4</sup> *Id.*

<sup>5</sup> Lederman & Weissenstein, *supra* note 1.



crickets or metal dragging across the floor.<sup>6</sup> The overall lack of information, and the government's vague responses on the current state of investigation raises questions related to whether injuries suffered by U.S. personnel in Cuba reflect acts of deliberate aggression towards the U.S. government.

The matter is of such grave public concern that on October 31, 2017, five members of Congress wrote a letter to the State Department asking it to address what steps have been taken to investigate the issue and prevent further injuries to American personnel.<sup>7</sup>

### **Requested Records**

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

1. All memoranda, reports, and analysis, including any correspondence with medical centers with expertise (including medical centers at the University of Pennsylvania and University of Miami), discussing the possibility or concluding that the “sonic attack” caused no physical injury or that any effects from the “sonic attacks” were likely psychosomatic.

American Oversight does not object to redaction from such records of any names or identifying information for any affected personnel.

2. Any communication with Congress (or any member of Congress, congressional committee, or congressional staff) regarding the “sonic attacks”—including any memoranda, reports, or analyses, including correspondence with medical centers with expertise (including medical centers at the University of Pennsylvania and University of Miami)—conveyed to Congress, discussing the possibility or concluding that the “sonic attacks” caused no physical injury, or that effects from “sonic attacks” were likely psychosomatic.

American Oversight does not object to redaction from such records of any names or identifying information for any affected personnel.

Please provide all responsive records from September 1, 2016, 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

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<sup>6</sup> *Id.*; Cohen, *supra* note 3.

<sup>7</sup> Letter from Members of Congress to Gene L. Dodaro, U.S. Comptroller General, U.S. Gov't Accountability Office (Oct. 31, 2017), <https://ros-lehtinen.house.gov/sites/ros-lehtinen.house.gov/files/10.31.17%20-%20Letter%20to%20GAO%20re%20State%20reaction%20to%20Cuba%20Attacks.pdf>.

request. If State 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>8</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>9</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 State’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>10</sup> Furthermore, agencies that have adopted the National Archives and

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<sup>8</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>9</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>10</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 State's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that State 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>11</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>12</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>13</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>14</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>15</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>11</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>12</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>13</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

<sup>14</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>15</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, State 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 State 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 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 22 C.F.R. § 171.16(a), American Oversight requests a waiver of fees associated with processing this request for records. First, 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>16</sup> Second, the request is primarily and fundamentally for non-commercial purposes.<sup>17</sup>

Under the public interest requirement, FOIA requesters must satisfy four factors in sequence.<sup>18</sup> American Oversight believes it has met these four factors for reasons set forth below.

The subject matter of the requested documents specifically relates to the operations or activities of the government because those affected were U.S. government personnel and their families, including diplomats and staffers who presumably may have been in Cuba during the course of carrying out their official duties.<sup>19</sup>

The requested documents will be “likely to contribute” to an understanding of specific government operations because of their potential to shed light on whether government personnel were in Cuba

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<sup>16</sup> 22 C.F.R. § 171.16(a)(1).

<sup>17</sup> 22 C.F.R. § 171.16(a)(2).

<sup>18</sup> *D.C. Technical Assistance Org. Inc., v. U.S. Dep’t of Hous. and Urban Dev. (D.C. Technical Assistance)*, 85 F.Supp.2d 46, 48–49 (D.D.C. 2000) (requested documents will contribute to “greater understanding of government activities”).

<sup>19</sup> Nora Gámez Torres, *Members of Congress Demand Answers From State Department About ‘Sonic’ Attacks in Cuba*, MIAMI HERALD (Oct. 31, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article181884531.html>.

for work-related reasons when they were exposed to the sound frequencies, and the circumstances, locations and patterns related to the sonic exposure.<sup>20</sup> Additionally, American Oversight's objective is to reveal to the public at large any information it receives related to its FOIA request for reports, memoranda or analyses on those U.S. personnel who suffered injuries that may or may not have been caused by exposure to high frequency sounds. American Oversight has the capacity to disseminate this information as it posts all records to its public websites and publishes analyses of its records. In the past, the Organization has successfully informed the public of specific government activities and operations. As an example, American Oversight obtained Education Secretary DeVos's calendar entries, which revealed Secretary DeVos's frequent absences from office, staffing choices, and the influence of charter schools and for-profit colleges on the Education Department.<sup>21</sup> The New York Times and CNN relied on American Oversight's analyses to report on Secretary DeVos's priorities within the Education Department.<sup>22</sup>

Disclosure will contribute to a greater understanding on the part of the public at large on the current state of America's diplomatic relations with Cuba, what kinds of safety measures are being taken to protect U.S. diplomats, and how safe it is for the general public to visit or conduct business there. The requested records also have the potential to inform the public on use of new sonic technologies as weapons in warfare. Having such knowledge would allow members of the public to make informed decisions on whether they should travel to, or conduct ongoing business in the country.

Disclosure will "significantly" contribute to the public's understanding of government activities or operations related to the America's diplomatic relations with Cuba, and potential foreign acts of aggression against the American government through attacks on diplomats.<sup>23</sup> 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>20</sup> *D.C. Technical Assistance*, 85 F.Supp.2d at 49. This, second factor, has two subparts: the requester's objective to disseminate information to a large segment of the public, and the requester's capacity to disseminate the requested information. *Id.*

<sup>21</sup> See *Influence & Access at the Department of Education*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/investigation/influence-access-at-the-department-of-education>; *Unexcused Absences: DeVos Calendars Show Frequent Days Off*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/unexcused-absences-devos>.

<sup>22</sup> Eric Lipton, *Betsy DeVos's School Schedule Shows Focus on Religious and Non Traditional Schools*, N.Y. TIMES, Oct. 27, 2017, <https://www.nytimes.com/2017/10/27/us/politics/betsy-devos-work-schedule-education.html>; Gregory Wallace et. al., *What Betsy DeVos's Schedule Tells Us About Her Agenda*, CNN (Oct. 29, 2017 12:22 PM), <http://www.cnn.com/2017/10/28/politics/devos-schedules-education/index.html>

<sup>23</sup> Josh Lederman, *Rex Tillerson Says U.S. Might Close Cuba Embassy After Mystery Attacks*, TIME, Sept. 17, 2017, <http://time.com/4945855/rex-tillerson-cuba-havana-embassy/>.

American Oversight's request is also primarily and fundamentally for non-commercial purposes.<sup>24</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 our public website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>25</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>26</sup> and published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>27</sup> Additionally, 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>28</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 22 C.F.R. § 171.11(f)(2), American Oversight requests that State expedite the processing of this request because there is an urgency to inform the public concerning actual or alleged government activity, and American Oversight disseminates information to the public.

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.<sup>29</sup> As described above, the alarming accounts of a series of potential "sonic attacks" causing U.S. personnel in Cuba to suffer hearing loss and traumatic brain injuries since

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<sup>24</sup> 22 C.F.R. § 171.16(a)(2)(i)-(iii).

<sup>25</sup> American Oversight currently has approximately 11,200 page likes on Facebook, and 33,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited August 21, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited August 21, 2017).

<sup>26</sup> *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

<sup>27</sup> *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

<sup>28</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

<sup>29</sup> 22 C.F.R. § 171.11(f)(2).

2016, with the most recent incident occurring in August, are breaking news stories of public interest. News outlets all over the country have been reporting on these ongoing incidents.

Additionally, the sonic attacks concern the federal government's actual and alleged diplomatic activities in Cuba. First, the affected personnel were U.S. government employees. Second, the attacks correlate with recent U.S. diplomatic policy decisions regarding travel to, and conducting business with Cuba. In September, Secretary Tillerson suddenly announced that he was considering closing the American Embassy in Cuba due to reports that U.S. personnel were falling ill.<sup>30</sup> Following the announcement, the State Department took drastic measures expelling fifteen Cuban diplomats from the U.S. and withdrawing more than half of its embassy staff in Havana.<sup>31</sup> Cuban officials have denied any involvement in the injuries suffered by American diplomats, and have accused the Trump Administration for derailing improvements in U.S.-Cuban relations.<sup>32</sup> While there still remains much speculation on whether sonic exposure caused these injuries, whether diplomats were in Cuba on official duties, and whether Americans visiting Cuba are currently in danger, these incidents, nevertheless, concern the operations of the federal government. The American public, for reasons set forth above, have a right to know the truth behind what is currently transpiring between the two countries.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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.<sup>33</sup> Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,<sup>34</sup> 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.”<sup>35</sup> 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 media platforms, such as Facebook and Twitter.<sup>36</sup> As discussed previously, American Oversight has

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<sup>30</sup> Gardiner Harris, *Tillerson Says U.S. May Close Cuba Embassy Over Mystery Ailments*, N.Y. TIMES, Sept. 17, 2017, <https://www.nytimes.com/2017/09/17/us/politics/tillerson-cuba-embassy.html>.

<sup>31</sup> Gardiner Harris et. al., *U.S. Expels 15 Cuban Diplomats, in Latest Sign Détente May Be Ending*, N.Y. TIMES, Oct. 3, 2017, <https://www.nytimes.com/2017/10/03/world/americas/us-cuba-diplomats.html>.

<sup>32</sup> Michael Weissensten & Andrew Rodriguez, *Cuba Insists that It Hasn't Carried Out Any Sonic Attacks on U.S. Diplomats*, TIME, Oct. 27, 2017, <http://time.com/4999808/cuba-defends-embassy-sonic-attack-diplomat/>.

<sup>33</sup> 28 C.F.R. § 16.5(e)(1)(ii).

<sup>34</sup> 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).

<sup>35</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>36</sup> American Oversight currently has over 11,300 page likes on Facebook, and over 33,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight>



demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>37</sup>

Accordingly, American Oversight's request satisfies the criteria for expedition.

### Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with State 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 202.869.5246. 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,

A handwritten signature in blue ink, appearing to read 'MS', is positioned above the typed name.

Melanie Sloan  
Senior Advisor  
American Oversight

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(last visited Sept. 6, 2017); American Oversight (@weareoversight), TWITTER (last visited Sept. 6, 2017).

<sup>37</sup> 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, [www.auditthewall.org](http://www.auditthewall.org).