



October 1, 2018

**VIA Online Portal**

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  
Via FOIAOnline

**Re: Expedited Freedom of Information Act Request**

Dear Ms. Day:

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 Thursday, September 27, 2018, the U.S. Senate Judiciary Committee held a hearing at which both Judge Brett Kavanaugh and Dr. Christine Blasey Ford testified regarding Dr. Ford's allegations that Judge Kavanaugh sexually assaulted her in the early 1980s. The nine-hour hearing gripped the nation, with a reported 20.4 million people watching on six broadcast and cable networks—and millions more streaming the hearing on phones and computers or viewing in public places.<sup>1</sup>

On Friday, September 28, 2018, following widespread calls—and notably the request of Senator Jeff Flake—for a new Federal Bureau of Investigation (FBI) investigation to investigate these and multiple other credible allegations regarding Judge Kavanaugh, the Senate Judiciary Chairman Chuck Grassley agreed to ask the White House to order a supplemental background investigation. The White House ordered the investigation on Friday, however press reporting suggests the White House Counsel and Senate Republicans are carefully managing the scope of the probe to keep it as narrow as possible.<sup>2</sup> As Judge Kavanaugh has been nominated to serve a lifetime term on the

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<sup>1</sup> Reuters, *More Than 20 Million Viewers Watched Kavanaugh Hearing on TV*, NBC NEWS, (Sept. 28, 2018, 7:27 PM) <https://www.nbcnews.com/pop-culture/tv/more-20-million-viewers-watched-kavanaugh-hearing-tv-n914946>.

<sup>2</sup> Eli Watkins, et al., *FBI Interviews Kavanaugh Accuser Deborah Ramirez As Part of Its Narrow Scope*, CNN, (Oct. 1, 2018, 7:04 AM) <https://www.cnn.com/2018/09/30/politics/fbi-brett-kavanaugh-investigation/index.html?no-st=1538406442>.



nation's highest court, there is an urgent need to reveal any investigative limitations that could undermine public confidence in the adequacy of the FBI probe into Judge Kavanaugh's conduct.

American Oversight seeks records to understand the degree of White House involvement in the FBI's supplemental background probe and to shed light on whether the White House is micromanaging or interfering in the investigation in order to advance political interests.

### **Requested Records**

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

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Twitter Direct Messages, or Facebook Messenger—telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between or among (including those copied or blind copied on emails) DOJ and any Senator or Senate staff member (including anyone at an email address ending in “senate.gov”) regarding the supplemental background investigation of Judge Brett Kavanaugh, nominee to be an Associate Justice of the Supreme Court.

American Oversight requests that DOJ search—at a minimum—the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of Legal Policy, and the Office of Legislative Affairs for records responsive to this request.

Please provide all responsive records from September 27, 2018, 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 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>3</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>4</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>5</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.**

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<sup>3</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>4</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>5</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>.

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>6</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>7</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>8</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>9</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>10</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>6</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>7</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>8</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

<sup>9</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>10</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>11</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>12</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>13</sup> There is significant public interest in understanding the scope of the supplemental investigation of Judge Kavanaugh given the serious allegations of misconduct he faces and public reporting that the White House has directed the FBI to severely limit its investigation in time and scope. The public deserves to know whether the FBI is conducting an investigation intended to uncover the truth about the background of a Supreme Court nominee, or if the parameters of the FBI’s investigation are narrowly limited for political reasons. 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>14</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>15</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>16</sup> American Oversight promptly posted the records to its website and

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<sup>11</sup> 28 C.F.R. § 16.10(k)(1).

<sup>12</sup> *Id.*

<sup>13</sup> 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

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

<sup>15</sup> American Oversight currently has approximately 11,900 page likes on Facebook and 45,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 1, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 1, 2018).

<sup>16</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>17</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>18</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(e)(1)(ii), (iv), American Oversight requests that DOJ 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.<sup>19</sup> The FBI is reportedly currently investigating allegations of sexual misconduct against Supreme Court nominee Judge Brett Kavanaugh.<sup>20</sup> Reporting from multiple outlets suggests that the scope of the investigation may have been limited by the president or White House officials.<sup>21</sup> As Judge Kavanaugh has been nominated to serve a lifetime term on the nation's highest court, there is an urgent need to reveal any investigative limitations that could undermine public confidence in the adequacy of the FBI probe into Judge Kavanaugh's conduct. The American public has a substantial and urgent interest in understanding whether the supplemental background investigation of Judge Kavanaugh is being conducted without limitations that would undermine public confidence in the investigation's findings.

Moreover, 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 undue narrowing of the scope of the FBI's investigation or potentially unprecedented directives from the White House to limit the relevant witnesses who may be questioned.<sup>22</sup> There has been intense public interest in and concern about the scope of the

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<sup>17</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>18</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

<sup>19</sup> 28 C.F.R. § 16.5(e)(1)(ii).

<sup>20</sup> Watkins et. al, *supra* note 2.

<sup>21</sup> See Michael Sykes, *White House Limits Scope of Kavanaugh FBI Investigation to Sexual Assault Claims*, AXIOS (Sept. 29, 2018), <https://www.axios.com/white-house-brett-kavanaugh-investigation-sexual-assault-464ade88-e74b-4074-a656-8323a3c504ad.html>; Grace Segers, *Scope of FBI's Kavanaugh Probe Defined by White House, Former Top Official Says*, CBS NEWS (Sept. 29, 2018, 5:31 PM), <https://www.cbsnews.com/news/kavanaugh-allegations-fbi-probe-defined-by-white-house-ron-hosko-former-fbi-assistant-director/>.

<sup>22</sup> Peter Baker & Michael S. Schmidt, *White House Tells F.B.I. to Interview Anyone Necessary for Kavanaugh Inquiry*, N.Y. TIMES, Oct. 1, 2018,

FBI’s investigation—as shown by the extensive media reporting detailed below<sup>23</sup>—and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Judge Kavanaugh’s nomination or to withdraw that support or reject his nomination to the Supreme Court.

I further certify that American Oversight is primarily engaged in disseminating information to the public.<sup>24</sup> 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,<sup>25</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>26</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>27</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>28</sup>

I further certify to be true and correct to the best of my knowledge and belief, that this request concerns “a matter of widespread and exceptional media interest in which there exist possible

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<https://www.nytimes.com/2018/10/01/us/politics/trump-fbi-kavanaugh.html> (“[S]everal former senior F.B.I. officials said that they could think of no previous instance when the White House restricted the bureau’s ability to interview potential witnesses during a background check.” “Chuck Rosenberg, who served as chief of staff under James B. Comey, the former F.B.I. director, said background investigations were frequently reopened, but that the bureau decides how to pursue new allegations. ‘The White House normally tells the F.B.I. what issue to examine, but would not tell the F.B.I. how to examine it, or with whom they should speak,’ he said. ‘It’s highly unusual — in fact, as far I know, uniquely so — for the F.B.I. to be directed to speak only to a limited number of designated people.’”).

<sup>23</sup> See *infra*, note 29.

<sup>24</sup> 28 C.F.R. § 16.5(e)(1)(iv).

<sup>25</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>26</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>27</sup> American Oversight currently has approximately 11,900 page likes on Facebook and 45,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Oct. 1, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 1, 2018).

<sup>28</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, <https://www.americanoversight.org/investigation/audit-the-wall>.

questions about the government's integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(iv). The supplemental background investigation of Judge Kavanaugh—and any parameters or limits to the investigation’s scope—has received extraordinarily “widespread and exceptional” media coverage.<sup>29</sup> And these reports raise important questions about the government’s integrity that affect public confidence as the public is concerned that the investigation may have been unduly limited for political purposes, causing the investigation to ignore important witnesses and decline to hear from individuals with relevant information.<sup>30</sup> Senators have expressed these same concerns, and Senator Dianne Feinstein, Ranking Member on the Judiciary Committee, has asked the White House and FBI to release the written directives concerning the supplemental background investigation.<sup>31</sup> Public confidence in Judge Kavanaugh’s lifetime appointment to a position on the Supreme Court could be undermined by a lack of public confidence in the FBI’s supplemental background investigation.

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 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,

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<sup>29</sup> See, e.g., Watkins, *supra* note 2; Sykes, *supra* note 20; Segers, *supra* note 20; Mike DeBonis and Josh Dawsey, *Fight Over Kavanaugh Intensifies Amid Confusion Over Limits of FBI Sexual Assault Investigation*, WASH. POST, (Sept. 30, 2018 5:55 PM), [https://www.washingtonpost.com/powerpost/administration-says-white-house-is-not-limiting-fbi-probe-of-kavanaugh-but-is-against-fishing-expedition/2018/09/30/aa7b796e-c4bb-11e8-b1ed-1d2d65b86d0c\\_story.html?utm\\_term=.2ad1edcd0e66](https://www.washingtonpost.com/powerpost/administration-says-white-house-is-not-limiting-fbi-probe-of-kavanaugh-but-is-against-fishing-expedition/2018/09/30/aa7b796e-c4bb-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.2ad1edcd0e66); Ken Dilanian, et al., *Limits to FBI’s Kavanaugh Investigation Have Not Changed, Despite Trump’s Comments*, NBC News, (Sept. 30, 2018, 12:21 PM), <https://www.nbcnews.com/politics/politics-news/white-house-limits-scope-fbi-s-investigation-allegations-against-brett-n915061>; John Wagner, *Trump Adds to Confusion Over Scope of FBI Investigation of Kavanaugh Accusations*, WASH. POST, (Oct. 1, 2018, 2:29 PM) [https://www.washingtonpost.com/politics/trump-adds-to-confusion-over-scope-of-fbi-investigation-of-kavanaugh-accusations/2018/10/01/1aa5e922-c561-11e8-b1ed-1d2d65b86d0c\\_story.html?utm\\_term=.5e370af88150](https://www.washingtonpost.com/politics/trump-adds-to-confusion-over-scope-of-fbi-investigation-of-kavanaugh-accusations/2018/10/01/1aa5e922-c561-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.5e370af88150); Stephen Collinson, *New Questions Emerge Over FBI Investigation of Kavanaugh*, CNN, (Oct. 1, 2018, 8:30 AM), <https://www.cnn.com/2018/10/01/politics/white-house-kavanaugh-confirmation-postponement/index.html>.

<sup>30</sup> See Harry Littman, *The F.B.I. Investigation We Deserve*, N.Y. TIMES, Oct. 1, 2018, <https://www.nytimes.com/2018/10/01/opinion/fbi-investigation-kavanaugh-witnesses.html>.

<sup>31</sup> See Michael D. Shear & Robin Pogrebin, *Democrats Denounce Limits on F.B.I.’s Kavanaugh Inquiry as a Farce*, N.Y. TIMES, Sept. 30, 2018, <https://www.nytimes.com/2018/09/30/us/politics/fbi-kavanaugh-investigation-scope-democrats.html>; Morgan Gstalter, *Feinstein Calls on White House to Release Scope of Kavanaugh Investigation*, THE HILL (Sept. 30, 2018, 6:49 PM), <https://thehill.com/homenews/senate/409168-feinstein-requests-written-directive-sent-by-white-house-to-fbi-for-kavanaugh>.



please contact Dan McGrath at [foia@americanoversight.org](mailto: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,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight

Cc: Sarah Isgur Flores