



November 20, 2018

VIA ELECTRONIC MAIL

Stephanie Carr
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
U.S. Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Re: Freedom of Information Act Request

Dear Ms. Carr:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the implementing regulations of the Department of Defense (DOD), 32 C.F.R. Part 286, American Oversight makes the following request for records.

Deputy Secretary of Defense Patrick Shanahan entered government service on July 19, 2017, with over three decades of experience at Boeing, where he most recently served as senior vice president. During his confirmation hearing, Deputy Secretary Shanahan committed to divesting all ties with Boeing with the exception of his executive retirement, which is allowed under federal ethics rules. He further committed to not deal with any Boeing-related matters unless cleared with the Office of Ethics, and he committed to put screening mechanisms in his calendar process to limit his exposure to Boeing-related matters.¹ American Oversight seeks records with the potential to shed light on Deputy Secretary's efforts to comply with his ethical obligations, and the extent of his communications with private industry

Requested Records

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

All email communications (including email messages, attachments, and calendar entries or invitations) between political appointees* in the Office of the Deputy Secretary of Defense

¹ Stenographic Transcript Before the Committee on Armed Services, "Nomination – Shanahan," UNITED STATES SENATE, June 20, 2017, https://www.armed-services.senate.gov/imo/media/doc/17-61_06-20-17.pdf.



(DSD) and any individual at Boeing, including CEO Dennis Muilenberg, and any email addresses ending in boeing.com.

For this portion of the request, American Oversight requests OSD search, at a minimum, the records of the following individuals:

- Deputy Secretary of Defense Patrick Shanahan
- Confidential Assistant Jillian Berrios
- Special Assistant Justin Johnson

This request includes all messages on which DSD officials appear (whether in the to, from, cc, or bcc field), as well as all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

Please provide all responsive records from July 19, 2017, through the date of search.

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.”² If it is your position that any portion of the requested records are 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.”³ 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.”⁴ 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.’”⁵

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

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

³ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁴ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁵ *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)).

portion of the document is non-exempt, and how the material is dispersed throughout the document.⁶ 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, DOD is on notice that litigation is reasonably foreseeable.

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 32 C.F.R. § 286.12(l)(1), 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 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 government operations and activities.⁷ Deputy Secretary of Defense Shanahan holds the second highest-ranking post in the Department of Defense, and the public deserves to know whether he is complying with his ethical obligations. The requested records have the potential to shed light on Deputy Secretary Shanahan's actions, including whether Deputy Secretary Shanahan has taken appropriate steps to avoid engaging in matters where he may have a conflict of interest. The request also has the potential to shed light on Secretary Shanahan's approach to engaging with private industry interests more broadly. American Oversight is committed to transparency and makes the responses agencies provide in response to FOIA requests publicly available. The subject of this request is a matter of public interest, and American Oversight would make these records publicly available.

This request is primarily and fundamentally for non-commercial purposes.⁸ 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

⁶ *Mead Data Central*, 566 F.2d at 261.

⁷ 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(i)-(ii).

⁸ 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(iii)(A)-(B).

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.⁹ 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,¹⁰ 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.¹¹ 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.¹²

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 DOD 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

⁹ American Oversight currently has approximately 11,900 page likes on Facebook, and 47,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 19, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 19, 2018).

¹⁰ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹¹ *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>.

¹² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.