



December 14, 2018

VIA ELECTRONIC MAIL

The Privacy Office
Department of Homeland Security
245 Murray Lane, SW,
Building 401, MS-0655
Washington, DC 20528-0655
foia@hq.dhs.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

In late October 2018, pipe bombs were sent to numerous high-profile individuals perceived to be critics of the president. The recipients of these pipe bombs included President Obama, Vice President Biden, a number of other high-profile Democratic officials and former officials, and, among others, CNN contributors.¹ The person arrested for sending these pipe bombs is reportedly an outspoken supporter of President Trump.² Although the president initially called for unity, he later seemed to blame media outlets for the attempted attacks.³ Shortly after these pipe bomb attacks, a man carried out a mass shooting at the Pittsburgh Tree of Life Congregation Synagogue, killing 11 people.⁴ The president later blamed the Pittsburgh attack and the pipe bombs for a Republican loss of momentum heading into the 2018 midterm elections.⁵ Other high-ranking

¹ See William K. Rashbaum, *Hillary Clinton, Barack Obama and CNN Offices Are Sent Pipe Bombs*, N.Y. TIMES, Oct. 24, 2018, <https://www.nytimes.com/2018/10/24/nyregion/clinton-obama-explosive-device.html>.

² William K. Rashbaum et al., *Outspoken Trump Supporter in Florida Charged in Attempted Bombing Spree*, N.Y. TIMES, Oct. 26, 2018, <https://www.nytimes.com/2018/10/26/nyregion/cnn-cory-booker-pipe-bombs-sent.html>.

³ Kate Rogers & Eileen Sullivan, *After Bomb Scares, Trump Tries Bipartisanship, Then Blames the Media*, N.Y. TIMES, Oct. 24, 2018, <https://www.nytimes.com/2018/10/24/us/politics/trump-bomb-cnn-obama-clintons.html?module=inline>.

⁴ Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES, Oct. 27, 2018, <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

⁵ Allyson Chiu, *Trump Mourns Loss of 'Tremendous Momentum' for GOP Because of Pipe Bombs, Synagogue Shootings*, WASH. POST, Nov. 2, 2018,



officials, including then-Attorney General Jeff Sessions and Homeland Security Secretary Kirstjen Nielsen, also made public statements related to these attacks.⁶

American Oversight seeks records with the potential to shed light on whether and to what extent partisan or electoral concerns affected the administration's public response to the pipe bombs sent to numerous individuals and the attack on the Tree of Life Congregation.

Requested Records

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

All final talking points prepared by DHS, or sent to DHS from the White House, concerning (1) the pipe bombs mailed to prominent individuals including Democratic officials and former officials, in October 2018, and/or (2) the October 27, 2018 mass shooting attack at the Tree of Life Congregation Synagogue in Pittsburgh.

This request would encompass, for example, talking points created for Secretary Nielsen or other DHS spokespersons, talking points created by DHS and sent to the White House for use by the president or other White House officials, and talking points sent by the White House to DHS.

Please provide all responsive records from October 15, 2018, to November 15, 2018.

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

https://www.washingtonpost.com/nation/2018/11/02/pipe-bombs-synagogue-shootings-stopped-tremendous-momentum-gop-trump-complains/?utm_term=.d296e8789047.

⁶ Kelly Cohen, *Jeff Sessions condemns attempted pipe bomb attacks*, WASH. EXAMINER (Oct. 25, 2018, 10:15 AM), <https://www.washingtonexaminer.com/news/jeff-sessions-condemns-attempted-pipe-bomb-attacks>; *Secretary Nielsen on Synagogue Attack, Pipe Bomb Arrest*, FOX NEWS, (Oct. 28, 2018), <https://www.foxnews.com/transcript/secretary-nielsen-on-synagogue-attack-pipe-bomb-arrest>.

the Federal Records Act and FOIA.⁷ 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.⁸

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 DHS’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.**⁹ 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 DHS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DHS 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.”¹⁰ 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

⁷ 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).

⁸ 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)).

⁹ 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>.

¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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.¹⁴ 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 DHS’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 will likely

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹³ *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)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

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 requested records are directly related to the public response of DHS, and the federal government, to high-profile acts of violence. There is significant interest in the subject of these records. The requested records will help American Oversight and the general public understand whether and to what extent this administration took political or electoral concerns into consideration when determining what public statements it should make regarding attempted attacks on perceived political opponents and a tragic attack on a religious minority. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. As described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience, allowing for greater transparency into government policy-making.

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.¹⁵ 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,¹⁶ 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.¹⁷ 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.¹⁸

¹⁵ American Oversight currently has approximately 12,100 page likes on Facebook and 49,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 12, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 12, 2018).

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

¹⁷ *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>.

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

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 DHS 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,

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