



December 20, 2018

VIA ELECTRONIC MAIL & ONLINE PORTAL

Douglas Hibbard
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

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Room 5511, 950 Pennsylvania Avenue, NW
Department of Justice
Washington, DC 20530-0001
usdoj-officeoflegalcounsel@usdoj.gov

Re: Expedited Freedom of Information Act Request

Dear Mr. Hibbard and Ms. Golden:

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.

Yesterday *The Wall Street Journal* reported that the president's nominee to serve as Attorney General—and oversee the probe of Special Counsel Robert Mueller—sent DOJ an unsolicited memorandum in June 2018 criticizing the Special Counsel's investigation.¹ DOJ also reportedly represented that, despite Mr. Barr's pre-nomination advocacy for curtailing the Special Counsel investigation, "senior department ethics officials had determined Mr. Barr's memo wouldn't pose a conflict for his appointment."² In light of concerns that Mr. Barr was nominated for the purpose of derailing the Special Counsel investigation,³ American Oversight seeks records with the potential to shed light on DOJ's determinations regarding whether Mr. Barr can be involved in overseeing the investigation being conducted by Special Counsel Robert Mueller and the extent of Mr. Barr's pre-nomination communications with DOJ regarding that investigation.

¹ Sadie Gurman & Aruna Viswanatha, *Trump's Attorney General Pick Criticized an Aspect of Mueller Probe in Memo to Justice Department*, WALL ST. J. (Dec. 19, 2018, 10:57 PM), <https://www.wsj.com/articles/trumps-attorney-general-pick-criticized-an-aspect-of-mueller-probe-in-memo-to-justice-department-11545275973>.

² *Id.*

³ Philip Shenon, *How Trump's Next Attorney General Could Derail the Mueller Probe*, POLITICO MAGAZINE, Dec. 11, 2018, <https://www.politico.com/magazine/story/2018/12/11/william-barr-trump-attorney-general-mueller-iran-contra-222859>.



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, or WhatsApp), telephone call logs, calendar invitations, calendar 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 (1) William Barr and (2) now-Acting Attorney General, and former chief of staff, Matthew Whitaker, Deputy Attorney General Rod Rosenstein, and/or Assistant Attorney General Steven Engel (or anyone communicating on behalf of Mr. Whitaker, Mr. Rosenstein, or Mr. Engel), concerning the investigation led by Special Counsel Robert Mueller.

Please provide all responsive records from June 1, 2018, through the date of the search.

The search should include all locations likely to have responsive records, but at a minimum should include the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of Legal Counsel.

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.⁴ **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.**⁵

⁴ 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).

⁵ 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

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.**⁶ 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.**

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.”⁷ 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.”⁸ 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.”⁹ Further, “the withholding agency must supply ‘a relatively detailed

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)).

⁶ 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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

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.”¹⁰

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.¹¹ 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.

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.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

¹² 28 C.F.R. § 16.10(k)(1).

¹³ *Id.*

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.¹⁴ There is significant public interest in understanding the potential involvement of Attorney General nominee William Barr in overseeing the investigation of Special Counsel Robert Mueller.¹⁵ The public deserves to know whether the Attorney General nominee will be in a position to act on his critical views of the Special Counsel investigation and to understand whether DOJ has weighed the potential ethical concerns that could arise from Mr. Barr’s potential participation in that investigation. 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.¹⁶ 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.¹⁷ 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,¹⁸ 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.¹⁹ 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

¹⁴ 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

¹⁵ See, e.g., Gurman & Viswanatha, *supra* note 1; Shenon, *supra* note 3; Jen Kirby, *William Barr, Trump’s Pick for Attorney General, Will Hold the Fate of the Mueller Probe*, VOX (Dec. 7, 2018, 5:20 PM), <https://www.vox.com/2018/12/7/18130659/william-barr-attorney-general-mueller-probe>.

¹⁶ 28 C.F.R. § 16.10(k)(1), (2)(iii).

¹⁷ American Oversight currently has approximately 12,100 page likes on Facebook and 49,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 20, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 20, 2018).

¹⁸ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁹ *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>.

information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁰

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), 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.²¹ The president has indicated that Mr. Barr will be his nominee for attorney General, and he is expected to be formally nominated early next month with a confirmation hearing shortly following that nomination.²² The public is intensely concerned with the effect Mr. Barr's potential confirmation will have on Special Counsel Robert Mueller's ongoing investigation, as evidenced by the extraordinary media coverage this issue has received.²³ These concerns have heightened with reports that Mr. Barr sent DOJ an unsolicited memorandum criticizing the Special Counsel investigation.²⁴

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 Mr. Barr's potential involvement in the Special Counsel

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

²¹ 28 C.F.R. § 16.5(e)(1)(ii).

²² See Gurman & Viswanatha, *supra* note 1.

²³ See, e.g., Maegan Vazquez & Kaitlan Collins, *Trump Nominates William Barr to Be His Next Attorney General*, CNN (Dec. 7, 2018, 3:44 PM), <https://www.cnn.com/2018/12/07/politics/william-barr-attorney-general-nomination/index.html>; Darren Samuelsohn et al., *Trump to Nominate William Barr as Attorney General*, POLITICO (Dec. 7, 2018, 3:11 PM), <https://www.politico.com/story/2018/12/07/trump-to-nominate-william-barr-as-attorney-general-1049560>; Ranae Reints, *Everything You Need to Know About Donald Trump's Attorney General Nominee William Barr*, FORTUNE, Dec. 7, 2018, <http://fortune.com/2018/12/07/william-barr-attorney-general/>; *William Barr Nominated by Donald Trump to Be US Attorney General*, BBC (Dec. 7, 2018), <https://www.bbc.com/news/world-us-canada-46487122>; Matt Zapotosky et al., *Trump Confirms He Will Nominate William Barr to Be Attorney General*, Dec. 7, 2018, https://www.washingtonpost.com/world/national-security/trump-confirms-he-will-pick-william-barr-as-his-next-attorney-general/2018/12/07/6e8d28ba-fa2d-11e8-863c-9e2f864d47e7_story.html?utm_term=.2a9b1d97f4cd; Daniel Barnes, *Trump to Nominate William Barr for Attorney General, Heather Nauert for U.N. Ambassador*, NBC NEWS (Dec. 7, 2018, 11:31 AM), <https://www.nbcnews.com/politics/white-house/trump-says-he-will-nominate-william-barr-attorney-general-n945201>.

²⁴ See Gurman & Viswanatha, *supra* note 1.

investigation. The American public needs to understand DOJ's determinations about Mr. Barr's potential participation in the Special Counsel investigation, and the extent of Mr. Barr's pre-nomination communications with DOJ regarding that investigation, before the public's elected representatives in the U.S. Senate vote to either confirm or reject Mr. Barr's nomination to serve as Attorney General. The American public needs the requested information in a timeframe that will allow them to petition their elected representatives regarding their votes on Mr. Barr's confirmation.

I further certify that American Oversight is primarily engaged in disseminating information to the public.²⁵ 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,²⁶ 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."²⁷ 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.²⁸ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁹

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, please contact Dan McGrath at foia@americanoversight.org or 202.897.4213. Also, if American

²⁵ 28 C.F.R. § 16.5(e)(1)(iv).

²⁶ 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).

²⁷ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁸ American Oversight currently has approximately 12,100 page likes on Facebook and 49,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Dec. 20, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 20, 2018).

²⁹ 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>.

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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight