



February 14, 2019

VIA ELECTRONIC MAIL

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
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 Freedom of Information Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records. The records requested herein may reside in multiple components or offices within your agency. We ask that you coordinate this request across your agency in your role as the agency's FOIA contact.

In the past two years, Ballard Partners has rapidly established itself as one of the most influential lobbying firms in Washington, D.C. during the era of the Trump administration. The firm has signed more than one hundred clients, both foreign and domestic, and has brought in approximately \$28 million in revenue.¹ Reports indicate that Ballard Partners has achieved this financial success through its connections to the Trump administration.² And, public records show that Ballard Partners has had extensive, and perhaps unparalleled, engagement with dozens of federal agencies in its lobbying efforts.³

American Oversight seeks records to shed light on the degree and nature of influence that Ballard Partners is having on the decision-making of the federal government, and particularly on the decisions and actions of this administration's political appointees.

¹ Anna Massoglia & Karl Evers-Hillstrom, *Revolving Door Brings Trump-Tied Lobbying Firm Even Closer to the White House*, OPENSECRETS, Jan. 22, 2019, <https://www.opensecrets.org/news/2019/01/ballard-partners-revolving-door-white-house/>.

² Fredreka Schouten, *Millions Flow to Fast-Growing Lobbying Firms with Ties to the Trump Administration*, USA TODAY (May 17, 2018, 6:01 PM), <https://www.usatoday.com/story/news/politics/2018/05/17/lobbyists-ties-donald-trump-mike-pence-make-millions-fees/618765002/>; Theodoric Meyer, *The Most Powerful Lobbyist in Trump's Washington*, POLITICO, Apr. 2, 2018, <https://www.politico.com/magazine/story/2018/04/02/most-powerful-lobbyist-in-trump-washington-217759>.

³ See Ballard Partners, Firm profile: Agencies 2018, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/firmagns.php?id=D000037635&year=2018>.



Requested Records

American Oversight requests that the Office of the Secretary of Defense (OSD) produce the following within twenty business days:

All email communications (including email messages, email attachments, and calendar invitations) between any of the political appointees⁴ listed below and any individual with an email address ending in ballardfl.com.

1. Patrick Shanahan, formerly Deputy Secretary, currently Acting Secretary
2. James Mattis, former Secretary
3. Robert Wilkie, formerly USD (P&R) (currently VA Secretary)
4. Jillian Berrios, Conf Asst to DSD Shanahan
5. William Bushman, Reader/SA to SecDef
6. Ralph Cacci, COS to DSD Shanahan
7. Eric Chewning, DASD (MIBP), current CoS to Acting Sec. Shanahan
8. Bridge Colby, DASD (S&FD) Strategy & Force Development
9. Robert Daigle, Director - Cost Assessment and Program Evaluation
10. Anthony DeMartino, Dep COS to the SecDef
11. Michael Duffey, SA for the WH Liaison
12. Pete Giambastiani, PDATSD (LA) Leg Affairs
13. John Gibson, DCMO, Chief Management Officer
14. Robert Hood, ASD (Legislative Affairs)
15. Steve Kitay, DASD Space Policy
16. Ellen Lord, USD (AT&L) Acquisition & Sustainment
17. Elaine McCusker, PDUSD (Comptroller)
18. Thomas Mooney, Chief of Staff
19. David Norquist, USD (Comptroller)
20. John Rood, USD (Policy)
21. David Trachtenberg, PDUSD(P)
22. Molly Walsh, Senior Advisor to USD(AT&L)
23. Daniel Walsh, Director WHMO
24. Burke Wilson, DASD (Cyber)
25. James O'Beirne, SA for WHLO

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and

⁴ American Oversight has used the exact title and position for each political appointee that was used by DOD in its April 10, 2018 list of “4th Estate Political Appointees on board” that was previously provided to American Oversight by OSD.

“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.⁵ **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.**⁶

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 your agency’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.**⁷ 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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists

⁵ 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).

⁶ 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)).

⁷ 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>.

that your agency 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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹ 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.¹² 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.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

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 your agency'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 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 likely to contribute significantly to public understanding of activities of the government. In particular, the requested records have the potential to show how much access political appointees in the Trump administration have afforded to a lobbying firm with strong connections to the administration.¹³ The requested records also have the potential to shed light on the influence that this powerful lobbying firm has had on agency decisions and actions. Your agency is among the agencies that the lobbying firm Ballard Partners has disclosed as a subject of its lobbying efforts in public records,¹⁴ and the public deserves to know whether and to what extent political appointee leaders of your agency have been influenced by the concerns of Ballard Partners' lobbying clients in making agency decisions. And, as described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

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

¹³ See Massoglia & Evers-Hillstrom, *supra* note 1; Schouten *supra* note 2.

¹⁴ See Ballard Partners, Firm profile: Agencies 2017, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/firmagns.php?id=D000037635&year=2017>; Ballard Partners, Firm profile: Agencies 2018, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/firmagns.php?id=D000037635&year=2018>.

¹⁵ American Oversight currently has approximately 12,100 page likes on Facebook and 49,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/>

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

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 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 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

(last visited Feb. 13, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 13, 2019).

¹⁶ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, 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>.