



May 17, 2019

VIA ELECTRONIC MAIL

The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-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.

The report issued by the Office of Special Counsel Robert Mueller III confirmed that the Main Intelligence Directorate of the General Staff of the Russian Army (GRU) was able to “gain access to the network of at least one Florida county government” in 2016, as part of a Russian effort to influence American elections that year.¹ However, the report does not identify the affected county.

American Oversight seeks records with the potential to increase the public’s understanding of the effects of Russian hacking efforts on the 2016 elections and the implications of those efforts for the integrity and security of future elections.

Requested Records

American Oversight requests that the Department of Homeland Security produce within twenty business days:

Records sufficient to identify any and all Florida county governments to which the GRU was able to gain access in 2016.

Department of Homeland Security should search all locations likely to contain such records, including at least the email accounts and files of the following custodians:

¹ SPECIAL COUNSEL ROBERT S. MUELLER, III REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 51 (Mar. 2019).



- Kirstjen Nielsen, Former Secretary of Homeland Security
- Kevin McAleenan, Acting Secretary of Homeland Security
- Elaine Duke, Former Deputy Secretary
- Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy and Former Deputy Chief of Staff
- Miles Taylor, Chief of Staff
- Chad Wolf, Former Chief of Staff
- Evelyn Lim, Former Deputy Chief of Staff
- Kristen Marquardt, Senior Counselor to the Secretary

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 your agency 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 are subject to the Federal Records Act and FOIA.² **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.**³

² 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).

³ 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

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.⁴ 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 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.”⁵ 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.”⁶ 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.”⁷ 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.’”⁸

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

related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁴ 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>.

⁵ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

⁸ *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)).

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.⁹ 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, we 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 6 C.F.R. § 5.11(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.¹⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹¹

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 operations or activities of the government.”¹² Revelations of Russian attempts to interfere in American elections have caused significant public and government concern and commanded sustained media attention since 2016.¹³ The Mueller Report’s confirmation that Russians were able

⁹ *Mead Data Central*, 566 F.2d at 261.

¹⁰ 6 C.F.R. § 5.11(k)(2).

¹¹ *Id.*

¹² 6 C.F.R. § 5.11(k)(2)(i)-(iv)

¹³ See e.g., Eric Schmitt ^, *In Push for 2020 Election Security, Top Official Was Warned: Don’t Tell Trump*, N.Y. TIMES, Apr. 24, 2019, <https://www.nytimes.com/2019/04/24/us/politics/russia-2020-election-trump.html> ; Anthony Man, *Mueller Report: FBI Finds Russian Attempt to Hack Presidential Election Got into One Florida County System*, S. FLA. SUN SENTINEL (Apr. 18, 2019, 6:05 PM), <https://www.sun-sentinel.com/news/politics/fl-ne-mueller-report-florida-findings->

to compromise a Florida county government risks further undermining public confidence in election security and integrity. The American public has a significant interest in knowing where this breach occurred, understanding the circumstances, and knowing what has been done to prevent similar problems, in that county or elsewhere, in future elections. The requested records would aid a broad audience in understanding the activities of the federal government, because election security directly impacts government integrity, which in turn affects the lives of every American. Put differently, these issues affect fundamental confidence in democratic governance. Moreover, disclosure of the requested information will contribute to public understanding; as discussed below, American Oversight has the ability and intention to effectively convey the information it receives to the public.

This request is primarily and fundamentally for non-commercial purposes.¹⁴ 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

[20190418-story.html](#); Miles Parks, *Russian Hackers Targeted the Most Vulnerable Part of U.S. Elections. Again.*, NPR (July 28, 2018, 7:00 AM), <https://www.npr.org/2018/07/28/633056819/russian-hackers-targeted-the-most-vulnerable-part-of-u-s-elections-again>; Patrick Donohue & Kevin Meyer, *Trump Official Calls Russian Meddling Charges Indisputable*, BLOOMBERG (Feb. 17, 2018, 10:16 AM), <https://www.bloomberg.com/news/articles/2018-02-17/trump-official-calls-russian-meddling-charges-incontrovertible>; Katherine Faulders & Lauren Pearle, *Despite Doubts, Trump Administration Insists Russian Meddling Will Be Countered*, ABC NEWS (Mar. 13, 2018, 6:10 AM), <http://abcnews.go.com/Politics/doubts-trump-administration-insists-russian-meddling-countered/story?id=53698473>; Morgan Chalfant, *Homeland Security Chief Touts Effort on Election Cybersecurity*, THE HILL (Feb. 20, 2018, 9:16 AM), <http://thehill.com/policy/cybersecurity/374600-homeland-security-chief-touts-effort-on-election-cybersecurity>; Tim Starks, *DHS Labels Elections as 'Critical Infrastructure'*, POLITICO (Jan. 6, 2017, 6:39 PM), <https://www.politico.com/story/2017/01/elections-critical-infrastructure-homeland-security-233304>; Kaveh Waddell, *Why Elections Are Now Classified as 'Critical Infrastructure'*, THE ATLANTIC, Jan. 13, 2017, <https://www.theatlantic.com/technology/archive/2017/01/why-the-government-classified-elections-as-critical-infrastructure/513122>.

¹⁴ 6 C.F.R. § 5.11(k)(3).

¹⁵ American Oversight currently has approximately 12,500 page likes on Facebook, and 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 16, 2019).

senior DOJ attorney, American Oversight promptly posted the records to its website¹⁶ 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 Beth France at foia@americanoversight.org or 202.897.2465. 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

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>.