



SPLC
Southern Poverty
Law Center

May 13, 2019

VIA ELECTRONIC MAIL

U.S. Department of State
Office of Information Programs and Services
A/GIS/IPS/RL
SA-2, Suite 8100
Washington, DC 20522-0208
FOIArequest@state.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of State (State), 22 C.F.R. Part 171, American Oversight and the Southern Poverty Law Center (SPLC) make the following request for records.

In early 2019, the Trump administration announced the launch of a campaign to end the criminalization of homosexuality around the globe.¹ At the same time, American activists who have worked to limit LGBTQ rights domestically have apparently made efforts to gain influence at the State Department, and Secretary Mike Pompeo has reportedly made overtures to some such groups.² American Oversight and SPLC seek to shed light on whether and to what extent State officials have collaborated with activists seeking to limit the rights of LGBTQ people domestically even as the administration intends to advocate against anti-LGBTQ policies abroad.

Requested Records

American Oversight and SPLC request that State produce the following records within twenty business days:

¹See Josh Lederman, *Trump Administration Launches Global Effort to End Criminalization of Homosexuality*, NBC NEWS (Feb. 19, 2019, 12:00 PM), <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>.

²See Kyle Mantyla, *Right-Wing Pastor Jim Garlow Stepping Down from the Pulpit to Focus on Government*, RIGHT WING WATCH (Sept. 14, 2018 10:29 AM), <http://www.rightwingwatch.org/post/right-wing-pastor-jim-garlow-stepping-down-from-the-pulpit-to-focus-on-government/>; Transcript, *Interview with Tony Perkins*, U.S. DEP'T OF STATE, July 19, 2018, <https://www.state.gov/secretary/remarks/2018/07/284231.htm>.

All communications (including emails, email attachments, text messages, calendar invitations and calendar entries) between (a) any State official listed in Column A, below, and (b) any individual or entity listed in Column B, below:

Column A (State personnel)	Column B (outside individuals and entities)
<ul style="list-style-type: none"> a) Secretary Mike Pompeo and any person communicating on his behalf, such as an assistant or scheduler, as well as Executive Secretary Lisa Kenma b) Ambassador-at-Large for Religious Freedom Sam Brownback and any person communicating on his behalf, such as an assistant or scheduler c) Former Ambassador to the United Nations Nikki Haley and any person communicating on her behalf, such as an assistant or scheduler d) All political appointees* in the office of the Assistant Secretary for Public Affairs e) Pamela D. Pryor, and any other person serving in the capacity of Under Secretary for Civilian Security, Democracy and Human Rights f) All political appointees* in the Bureau of Democracy, Human Rights and Labor g) All political appointees* in the Office of Policy Planning h) Former Senior Advisor for the Bureau of International Organization Affairs Mari Stull 	<ul style="list-style-type: none"> a) Michele Bachmann b) Rick Scarborough c) Scott Spages d) Jim Garlow e) The Jefferson Gathering f) Well Versed Nations g) Skyline United Nations h) Hammarsköld Society i) Wallenberg Society

Please produce all responsive records from January 20, 2017, through the date of search.

*“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, or any persons hired under Temporary Non-career SES Appointments, or Limited Term SES Appointments.

In addition to the records requested above, we also request 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 State 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.

We seek 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.³ **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; We have 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.**⁴

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 State’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.**⁵ Furthermore, agencies that have adopted the National Archives and

³ 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).

⁴ 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)).

⁵ 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>.

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 State's archiving tools would capture that email under Capstone. Accordingly, we insist that State 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. We are 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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, State is on notice that litigation is reasonably foreseeable.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

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, we welcome an opportunity to discuss this 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, 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 22 C.F.R. § 171.16(a), American Oversight and SPLC request a waiver of fees associated with processing this request for records. First, 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.¹¹ Second, the request is primarily and fundamentally for non-commercial purposes.¹²

Under the public interest requirement, FOIA requesters must satisfy four factors.¹³ We have met these four factors for the reasons set forth below. The subject matter of the requested records specifically relates to the operations or activities of the government, because it concerns communications made by State personnel in their official capacities, including communications with outside organizations and individuals who may be attempting to influence State's policies on the issue of LGBTQ rights.¹⁴ The requested documents will be "likely to contribute" to an understanding of specific government operations because of their potential to shed light on any role such activists have played in shaping U.S. foreign policy.

Increasing the likelihood that disclosure of these records will contribute significantly to public understanding, there is currently little information available concerning State's communications with outside social conservative groups. For example, in March 2019, Secretary Mike Pompeo held a briefing call for "faith-based media" from which other media outlets were barred and whose attendees State has refused to disclose.¹⁵ The requested records thus have the potential to shed

¹¹ 22 C.F.R. § 171.16(a)(1).

¹² 22 C.F.R. § 171.16(a)(2).

¹³ *D.C. Technical Assistance Org. Inc. v. U.S. Dep't of Hous. and Urban Dev. (D.C. Technical Assistance)*, 85 F.Supp.2d 46, 48-49 (D.D.C. 2000) (requested documents will contribute to "greater understanding of government activities").

¹⁴ See, e.g., Mantyla, *supra* note 2.

¹⁵ See Michelle Kosinski & Jennifer Hansler, *State Department Bars Press Corps from Pompeo Briefing, Won't Release List of Attendees*, CNN (Mar. 19, 2019, 9:28 PM), <https://www.cnn.com/2019/03/18/politics/state-department-faith-outlets-briefing/index.html>.

light on State activities of widespread social interest to which the general public has not been privy. Our objective is to reveal to the public at large any information we receive related to this FOIA request. As described in more detail below, American Oversight and SPLC have the capacity to disseminate this information to a reasonably broad audience of individuals interested in the subject matter. American Oversight posts all records to its public websites and publishes analyses of its records. For instance, in the past, American Oversight has successfully informed the public of specific government activities and operations. As an example, American Oversight obtained Education Secretary DeVos's calendar entries, which revealed Secretary DeVos's frequent absences from office, staffing choices, and the influence of charter schools and for-profit colleges on the Education Department.¹⁶ The *New York Times* and CNN relied on American Oversight's analyses to report on Secretary DeVos's priorities within the Department of Education.¹⁷ As described in more detail below, SPLC disseminates information and analyses and regularly participates in public forums related to the subject matter of this request.

Disclosure will contribute to a greater understanding on the part of the public at large about the extent to which the State Department is committed to expanding the rights of LGBTQ people around the world. Disclosure will "significantly" contribute to the public's understanding of government activities or operations related to whether activists with records of opposing the expansion of LGBTQ rights are quietly influencing U.S. foreign policy. The subject of this request is a matter of public interest, and the public's understanding of the government's activities would be enhanced through American Oversight and SPLC's analysis and publication of these records.

American Oversight and SPLC's request is also primarily and fundamentally for non-commercial purposes.¹⁸

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 our public website and promotes their availability on social media platforms, such as Facebook and

¹⁶ See *Influence & Access at the Department of Education*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/investigation/influence-access-at-the-department-of-education>; *Unexcused Absences: DeVos Calendars Show Frequent Days Off*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/unexcused-absences-devos>.

¹⁷ Eric Lipton, *Betsy DeVos's School Schedule Shows Focus on Religious and Nontraditional Schools*, N.Y. TIMES, Oct. 27, 2017, <https://www.nytimes.com/2017/10/27/us/politics/betsy-devos-work-schedule-education.html>; Gregory Wallace et al., *What Betsy DeVos's Schedule Tells Us About Her Agenda*, CNN (Oct. 29, 2017, 12:22 PM), <http://www.cnn.com/2017/10/28/politics/devos-schedules-education/index.html>.

¹⁸ 22 C.F.R. § 171.16(a)(2)(i)-(iii).

Twitter.¹⁹ 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, American Oversight promptly posted the records to its website²⁰ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²¹ As an additional 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.²²

SPLC likewise is a 501(c)(3) nonprofit and does not have a commercial purpose, nor is the release of the information requested in SPLC's financial interest. Using litigation, education, and other forms of advocacy, the SPLC works toward the ideals of equal justice and equal opportunity. In furtherance of this mission, SPLC engages in disseminating information and regularly participating in public forums regarding civil rights. SPLC gathers information through research and FOIA requests on emerging and ongoing civil rights issues. That information is used to create and publish unique reports and public education materials, which are published in print and/or on the internet at www.splcenter.org.²³ Further, SPLC qualifies as a representative of the news media pursuant to the OPEN Government Act of 2007. Pursuant to the statute, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."²⁴ The information SPLC seeks out and the publications it creates, such as the unique reports and public education materials described above, are intended to educate and inform the public of policies, events, and news that affects their civil rights. The intended audience is elected officials and policy makers, the general public, interest groups, and various stakeholders nationwide.

¹⁹ American Oversight currently has approximately 12,200 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited May 13, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 13, 2019).

²⁰ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²¹ *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>.

²² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

²³ See, e.g., Hatewatch Staff, *FOIA Documents Reveal how Anti-Muslim Groups Use Idaho State Representative Eri Redman to Sound the False Alarm on "Sharia Law,"* SOUTHERN POVERTY LAW CENTER, Feb. 12, 2018, <https://www.splcenter.org/hatewatch/2018/02/12/foia-documents-reveal-how-anti-muslim-groups-use-idaho-state-representative-eric-redman>.

²⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Accordingly, American Oversight and SPLC qualify for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. We look forward to working with State 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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. Also, if our request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Melanie Sloan
Senior Advisor
American Oversight



Heidi Beirich
Intelligence Project Director
Southern Poverty Law Center