



May 21, 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 makes the following request for records.

On May 9, 2019, President Trump's personal lawyer, Rudolph Giuliani, announced that he would travel to Ukraine to meet with the country's president-elect to urge the Ukrainian government to pursue an investigation related to the son of former Vice President Biden—a potential electoral opponent of the president.¹ Mr. Giuliani, reportedly aided by the president's former attorneys Victoria Toensing and Joseph E. diGenova, defended his planned trip by stating that “[w]e’re not meddling in an election, we’re meddling in an investigation.”² After facing widespread criticism for this effort to influence a foreign government's law enforcement efforts for political gain, Mr. Giuliani canceled his trip to Ukraine.³

It is more troubling that, shortly before Mr. Giuliani announced his plan to attempt to “meddl[e]” in a Ukrainian investigation related to one of the president's potential political opponents, State recalled U.S. Ambassador to Ukraine Marie Yovanovitch, a career foreign service officer who has served under Democratic and Republican presidents.⁴ Ambassador Yovanovitch had faced

¹ Kenneth P. Vogel, *Rudy Giuliani Plans Ukraine Trip to Push for Inquiries That Could Help Trump*, N.Y. TIMES, May 9, 2019, <https://www.nytimes.com/2019/05/09/us/politics/giuliani-ukraine-trump.html>.

² *Id.*

³ Kenneth P. Vogel, *Rudy Giuliani Cancels His Trip to Ukraine, Blaming Democrats’ ‘Spin,’* N.Y. TIMES, May 11, 2019, <https://www.nytimes.com/2019/05/11/us/politics/rudy-giuliani-ukraine.html>.

⁴ Robbie Grammer & Amy MacKinnon, *U.S. Ambassador to Ukraine Recalled in ‘Political Hit Job,’ Lawmakers Say*, FOREIGN POLICY (May 7, 2019, 12:09 PM), <https://foreignpolicy.com/2019/05/07/us-ambassador-to-ukraine-recalled-in-political-hit-job-lawmakers-say-marie-yovanovitch-lutsenko-right-wing-media-accusations-congress-diplomats-diplomacy/>.



criticism from conservative media for purportedly criticizing the president in private conversations.⁵ Senator Chris Murphy has, further, expressed concern that Ambassador Yovanovitch's recall may be related to Mr. Giuliani's efforts to influence Ukrainian investigations.⁶

American Oversight seeks records with the potential to shed light on whether and to what extent the political interests of the president have influenced State Department policies and actions in Ukraine, including actions related to the recall of Ambassador Yovanoitch and the efforts of the president's personal attorney to persuade the Ukrainian government to conduct an investigation connected to a potential political opponent of the president.

Requested Records

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

1. 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, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of the State officials specified below regarding U.S. Ambassador to Ukraine Marie Yovanovitch.
 - a) Secretary Mike Pompeo, or anyone communicating on his behalf, such as an acting chief of staff, his executive assistant, special assistants, or schedulers;
 - b) Senior Advisors to Secretary Pompeo, P. Michael McKinley, Mary Kissel, and Toni Porter;
 - c) Deputy Secretary, John J. Sullivan, or anyone communicating on his behalf, such as an assistant or scheduler;
 - d) Counselor to the Secretary, Thomas U Brechbuhl;
 - e) Senior Policy Advisor and Special Representative for Iran, Brian Hook;
 - f) Nominee for Under Secretary for Management, Brian Bulatao;
 - g) Under Secretary for Political Affairs, David Hale;
 - h) Executive Secretary Lisa Kenna;
 - i) Director of Policy Planning, Kiron Skinner;
 - j) Policy Planning member, John Zadrozny;
 - k) White House Liaison, Carrie Cabelka, or any other individuals serving in the role of White House Liaison;
 - l) Assistant Secretary for Public Affairs, Michelle Giuda;
 - m) Department Spokesperson, Heather Nauert;

⁵ *Id.*

⁶ Letter from Sen. Chris Murphy to Sen. Jim Risch, Chairman, Comm. on Foreign Relations, May 10, 2019, <https://www.murphy.senate.gov/download/ukraine-giuliani-letter>.

- n) Assistant Secretary for Legislative Affairs, Mary Elizabeth Taylor;
- o) Acting Assistant Secretary for Legislative Affairs, Charles Faulkner;
- p) Assistant Secretary, Bureau of International Organization Affairs, Kevin Moley;
- q) Senior Advisor for the Under Secretary for Civilian Security, Democracy, and Human Rights, Pam Pryor; or
- r) Special Assistant for the Under Secretary for Civilian Security, Democracy, and Human Rights, Catharine O'Neill.

For this item, please produce all responsive records from May 1, 2018, through the date of the search.

2. All communications (emails, letters, and diplomatic cables) sent or received by U.S. Ambassador to Ukraine Marie Yovanovitch from April 22, 2019 to May 7, 2019. Wide-distribution news clippings, news alerts and news aggregations can be excluded and need not be produced.
3. 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, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between State and the White House (including, but not limited to, emails with addresses ending in eop.gov) regarding the early recall of Ambassador to Ukraine Marie Yovanovitch.

For this item, please produce all responsive records from April 1, 2019, through the date of the search.

For this item, American Oversight believes that State is best positioned to identify the officials most likely to possess responsive records, but American Oversight requests that, at a minimum, State search the files of the Office of the Secretary and the Office of the White House Liaison.

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 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.

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.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 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.**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 State’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that State use the most up-to-date technologies to search for responsive information and take steps

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>.

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 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, State 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 State can decrease the likelihood of costly and time-consuming litigation in the future.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.

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 22 C.F.R. § 171.16(a), American Oversight requests 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.¹⁵ Second, the request is primarily and fundamentally for non-commercial purposes.¹⁶

Under the public interest requirement, FOIA requesters must satisfy four factors.¹⁷ American Oversight has 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, including communications surrounding an effort by the personal attorney to the president to persuade the Ukrainian government to investigate a family member of one of the president's potential political opponents just after the chief U.S. diplomat to Ukraine was recalled.¹⁸ There is significant public interest in understanding whether and to what extent the perceived political interests of the president are influencing U.S. foreign policy toward Ukraine, including whether a career diplomat was displaced in connection with an effort to use the president's private attorney to lobby Ukrainian officials.¹⁹ The subject of this request is a matter of public interest, and the public's understanding of the government's activities and use of resources would be enhanced through American Oversight's analysis and publication of these records.

Increasing the likelihood that disclosure of these records will contribute significantly to public understanding, American Oversight's objective is to reveal to the public at large any information it receives related to this FOIA request, and little information is currently available regarding the subject matter of this request—specifically, whether high-ranking State officials have coordinated with political allies of the president to displace a career diplomat in Ukraine for a perceived lack of political loyalty in conjunction with the efforts of the president's attorney to pressure the Ukrainian government to undertake investigations to benefit the president's perceived political interests.²⁰

¹⁵ 22 C.F.R. § 171.16(a)(1).

¹⁶ 22 C.F.R. § 171.16(a)(2).

¹⁷ *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").

¹⁸ See Vogel *supra* note 1; Vogel *supra* note 3; Grammer & Mackinnon *supra* note 4.

¹⁹ See Letter from Sen. Murphy, *supra* note 6.

²⁰ See Vogel *supra* note 1; Vogel *supra* note 3; Grammer & Mackinnon *supra* note 4.

American Oversight has the capacity to disseminate this information as it posts all records to its public websites and publishes analyses of its records. In the past, the organization 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 and the influence of charter schools and for-profit colleges on the Education Department.²¹ The *New York Times* and CNN relied on American Oversight's analyses to report on Secretary DeVos's priorities within the Department of Education.²²

American Oversight's request is also primarily and fundamentally for non-commercial purposes.²³ 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 Twitter.²⁴ 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 website²⁵ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁶ 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

²¹ 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>.

²² 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>.

²³ 22 C.F.R. § 171.16(a)(2)(i)-(iii).

²⁴ American Oversight currently has approximately 12,300 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited May 20, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 20, 2019).

²⁵ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁶ *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>.

releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁷

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 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 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,



Melanie Sloan
Senior Advisor
American Oversight

²⁷ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.