



May 1 2019

VIA ELECTRONIC MAIL

U.S. Department of Veterans Affairs
810 Vermont Avenue NW
(005R1C) VACO
Washington, DC 20420
vacofoiaservice@va.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 Veterans Affairs (VA), 35 C.F.R. § 1.550, American Oversight makes the following request for records.

In March 2019, Chairman Cummings of the House Oversight Committee sent a letter to the White House Counsel detailing White House Adviser Jared Kushner's use of private email and messaging applications—specifically WhatsApp—in conducting official business, including in communications with foreign leaders.¹ In light of Mr. Kushner's extensive influence² over a wide range of policies across the Trump administration and his involvement in a wide variety of government initiatives—from sensitive diplomacy to veterans affairs to criminal justice reform—American Oversight seeks records with the potential to shed light on Mr. Kushner's influence on federal policy and high-ranking agency officials. Public reports demonstrate that some of Mr. Kushner's communications regarding federal government business with these officials are likely sent through the WhatsApp messaging application.

Furthermore, Kushner has been substantively involved in Veterans Affairs issues, and reporting indicates direct communication between Kushner and senior VA officials—specifically former Secretary Shulkin and former Chief Information Officer Blackburn—regarding matters including a

¹ Letter from Elijah E. Cummings, Chairman of House of Representatives Committee on Oversight and Reform to Pat Cipollone, White House Counsel, Mar. 21, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-21.EEC%20to%20Cipollone-WH.pdf>; Nicholas Fandos, *Jared Kushner and Ivanka Trump Use Private Accounts for Official Business, Their Lawyer Says*, N.Y. TIMES, Mar. 21, 2019, <https://www.nytimes.com/2019/03/21/us/politics/jared-kushner-whatsapp.html>.

² Jessica Kwong, *Jared Kushner is Growing More Powerful in the White House, Frustrating Trump Aides: Report*, NEWSWEEK (Jan. 17, 2019, 1:00 PM) <https://www.newsweek.com/jared-kushner-growing-more-powerful-white-house-frustrating-trump-aides-1296220>.



multibillion-dollar IT contract.³ Former Chief of Staff and Acting Secretary Peter O’Rourke—also an ex-Trump campaign aide—was also involved in these contract issues and worked closely with the “Mar-a-Lago Trio,” the group of three Trump associates who have, alongside Kushner, exerted considerable influence on VA leadership.⁴ Public reporting strongly suggests that Mr. Kushner’s electronic communications regarding government business with these VA officials may have sometimes been transmitted through WhatsApp messages.

American Oversight seeks records to shed light on whether and to what extent Kushner is participating in Veterans Affairs policy matters and to what extent VA officials have communicated with him using private messaging platforms.

Requested Records

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

All WhatsApp messages sent or received between (1) the VA officials specified below and (2) White House adviser Jared Kushner. Screenshots of WhatsApp messages with Kushner are considered responsive to this request.

- i. Former Secretary David Shulkin
- ii. Former Chief Information Officer Scott Blackburn
- iii. Former Chief of Staff Peter O’Rourke

Given the reports establishing both that Mr. Kushner regularly uses WhatsApp messages for communications regarding official government business and Mr. Kushner’s relationship with the relevant agency officials, the agency must conduct an adequate search for responsive WhatsApp messages “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). An adequate search will likely require asking officials with knowledge to aid in identifying responsive records. Although many agencies have policies requiring that official text messages copy an agency employee’s email address, an electronic search of email records would not be a sufficient search for this request because WhatsApp messaging applications do not have the technological capability to permit copying or forwarding to an email address.

³ Arthur Allen, *VA Joins Military in Fraught Multibillion-dollar Health IT Contract*, POLITICO (May 17, 2018, 5:51 PM), <https://www.politico.com/story/2018/05/17/va-military-health-it-contract-550659>; Isaac Arnsdorf, *The VA Shadow Rulers’ Signature Program Is “Trending Towards Red,”* PROPUBLICA (Nov. 1, 2018, 1:11 PM), <https://www.propublica.org/article/va-shadow-rulers-program-is-trending-towards-red>; *VA Records Reflecting External Communications Between Secretary Shulkin’s Office and Perlmutter and Moskowitz*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/va-records-reflecting-external-communications-between-secretary-shulkins-office-and-perlmutter-and-moskowitz>.

⁴ *Id.*

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

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 VA 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.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 VA’s prior

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)).

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 VA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that VA 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

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>.

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)).

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.

Where possible, please provide responsive material in electronic format by email or in PDF 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 35 C.F.R. § 1.561(n), 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 activities of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, as it directly concerns the communications practices of senior administration officials and the steps taken to ensure compliance with federal records retention law—a matter that President Trump has suggested is extremely important. The request also seeks records that will shed light on the impact White House Adviser Jared Kushner has had on VA actions, policy, and operations. 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. And, as described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

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

¹³ 35 C.F.R. § 1.561(n)(2)(i).

¹⁴ 35 C.F.R. § 1.561(n)(2)(ii).

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 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 VA 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

¹⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 54,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Apr. 30, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 30, 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>.

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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight