



July 22, 2019

VIA ONLINE PORTAL

Michael Toland, Ph.D.
Departmental FOIA Officer
Office of Privacy and Open Government
U.S. Department of Commerce
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230
Via FOIAOnline

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, American Oversight makes the following request for records.

The president appointed former Secretary of the Army Mark Esper to serve as Acting Secretary of Defense last month¹ and subsequently nominated Dr. Esper to serve as Secretary of Defense in a permanent capacity.² Congress has fast-tracked Dr. Esper's confirmation process, and a confirmation vote is expected imminently.³

Dr. Esper previously served as a lobbyist for the defense contractor Raytheon,⁴ which raises concerns about the matters that Dr. Esper has influenced or may influence in his service in the Army and at the Department of Defense. It is particularly concerning that Dr. Esper filed lobbying disclosure reports that show he was actively lobbying the Trump

¹ Helene Cooper, *Trump to Officially Nominate Esper as Next Defense Secretary*, N.Y. TIMES, June 21, 2019, <https://www.nytimes.com/2019/06/21/us/politics/mark-esper-defense-secretary-nomination.html>.

² Donovan Slack, *Trump Officially Nominates Mark Esper as Next Defense Secretary*, USA TODAY (July 15, 2019, 3:30 PM), <https://www.usatoday.com/story/news/politics/2019/07/15/mark-esper-officially-nominated-trump-defense-secretary/1696656001/>.

³ Andrew Clevenger, *Esper on Path for Quick Confirmation Despite Raytheon Ties*, ROLL CALL (July 16, 2019, 2:13 PM), <https://www.rollcall.com/news/congress/esper-path-quick-confirmation-despite-raytheon-ties>.

⁴ Cooper, *supra* note 1.



administration throughout much of 2017, even as he presumably prepared to assume the post of Secretary of the Army.⁵

American Oversight seeks records with the potential to shed light on Dr. Esper's lobbying efforts for Raytheon at your agency,⁶ and the lobbying of Raytheon lobbyists with whom Dr. Esper worked, in the months before he assumed a high-ranking position within the Trump administration. As described below, there is an urgency to inform the public regarding this matter in light of Dr. Esper's upcoming confirmation vote to serve as Secretary of Defense in a permanent capacity.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that the Department of Commerce produce the following records as soon as practicable, and at least within twenty business days:

All email communications (including emails, email attachments, and calendar invitations) between (1) the Commerce officials specified below and (2) Mark T. Esper or any other individual communicating from an email address ending in raytheon.com.

1. The Immediate Office of the Secretary: the Secretary, and anyone serving on behalf of the Secretary including in an acting capacity such as Chiefs and Deputy Chiefs of Staff, executive and administrative assistants, and schedulers;
2. The Immediate Office of the Assistant Secretary for Intergovernmental and Legislative Affairs: the Assistant Secretary, and anyone serving on their behalf such as Chiefs and Deputy Chiefs of Staff, executive and administrative assistants, and schedulers;
3. The Immediate Office of the White House Liaison: anyone serving as White House Liaison or Advisor, any Deputy Liaisons or Advisors, and anyone serving on their behalf such as Chiefs and Deputy Chiefs of Staff, executive and administrative assistants, and schedulers.

Please provide all responsive records from January 20, 2017, through November 20, 2017.

⁵ See Lobbying Report, Lobbying Disclosure Act of 1995 (Section 5), Q1 2017, <http://disclosures.house.gov/ld/ldxmlrelease/2017/Q1/300877717.xml>; Lobbying Report, Lobbying Disclosure Act of 1995 (Section 5), Q2 2017, <http://disclosures.house.gov/ld/ldxmlrelease/2017/Q2/300897575.xml>; Lobbying Report, Lobbying Disclosure Act of 1995 (Section 5), Q3 2017, <http://disclosures.house.gov/ld/ldxmlrelease/2017/Q3/300916838.xml>.

⁶ *Id.*

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's 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 a better understanding of relevant government procedures by the general public in a significant way. 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 the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."⁷ The public has a significant interest in understanding Dr. Esper's lobbying efforts directed at the federal government in the months before he joined the Trump administration to serve as Secretary of the Army. Records with the potential to shed light on Dr. Esper's lobbying efforts (and those of the Raytheon lobbyists he was working with or oversaw) shortly before he assumed a high-ranking role would contribute significantly to public understanding of operations of the federal government, including whether Dr. Esper lobbied on matters that he was subsequently in a position to influence in his senior roles within the Trump administration. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁸ 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.⁹

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses

⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

⁸ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ American Oversight currently has approximately 12,200 page likes on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited July 17, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 17, 2019).

posted to its website.¹⁰ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;¹¹ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹² posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹³ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁴ posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁵

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), and your agency's implementing regulations, American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged

¹⁰ *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹¹ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>.

¹² *See generally Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹³ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁴ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁵ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

government activity. There is an urgent need to inform the public regarding Acting Defense Secretary Esper's lobbying of the Trump administration in the months before he joined the administration in light of Dr. Esper's imminent confirmation vote to serve in the cabinet as Secretary of Defense in a permanent capacity. In the short time since the president appointed Dr. Esper to be Acting Secretary of Defense and nominated him to serve in that role in a permanent capacity, there has been significant public interest in Dr. Esper's lobbying efforts on behalf of Raytheon,¹⁶ as well as potential conflicts of interest that may arise due to that past lobbying work.¹⁷

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about the lobbying efforts Dr. Esper directed at the Trump administration in light of Dr. Esper's nomination to serve as Secretary of Defense in a permanent capacity.¹⁸ Dr. Esper's imminently pending confirmation vote to serve as Secretary of Defense in a permanent capacity is exactly the type of "matter of a current exigency to the American public"¹⁹ that courts have found justifies expedited processing of FOIA requests. The requested information has the potential to shed light on whether Dr. Esper has complied with ethics requirements and recusal obligations since joining the Trump administration. The public must have access to the requested information in a timely manner in order to effectively petition their representatives to vote to confirm or reject Dr. Esper's nomination to an extraordinarily powerful and important office.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found

¹⁶ Jacqueline Feldscher, *Why the Acting Defense Secretary May Have to Sit Out Turkey Missile Talks*, POLITICO (June 19, 2019, 5:27 PM), <https://www.politico.com/story/2019/06/19/mark-esper-turkey-negotiations-1541664>; Karl Evers-Hillstrom & Reid Champlin, *Boeing Executive Out, Raytheon Lobbyist In to Lead Pentagon*, OPENSECRETS.ORG, June 18, 2019, <https://www.opensecrets.org/news/2019/06/raytheon-lobbyist-mark-esper-to-lead-pentagon/>; Charles Tiefer, *Appointment of Esper as Acting Secretary Worsens Trump Tilt Toward Lobbyists*, FORBES (June 18, 2019, 6:58 PM), <https://www.forbes.com/sites/charlestiefer/2019/06/18/lobbyist-esper-as-acting-defense-secretary-worsens-trump-tilt-to-lobbyists/#2434edaa4368>.

¹⁷ Joe Gould, *Pentagon Nominee Esper, a Former Raytheon Lobbyist, Must Extend Recusal, Says Warren*, DEFENSENEWS, July 15, 2019, <https://www.defensenews.com/congress/2019/07/15/pentagon-nominee-esper-a-former-raytheon-lobbyist-must-extend-recusal/>.

¹⁸ Cooper, *supra* note 1.

¹⁹ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469).

to satisfy the criteria necessary to qualify for expedition,²⁰ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”²¹

American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.²² As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²³

Accordingly, American Oversight’s request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

²⁰ See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

²¹ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²² American Oversight currently has approximately 12,200 page likes on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited July 17, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 17, 2019).

²³ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.’s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration’s Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions’ Letter Shows DOJ Acted On Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.²⁴ 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, by intent or through negligence, failed to meet their obligations.²⁵
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁶ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the

²⁴ 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).

²⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁶ 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>.

requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format 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.

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, please contact Dan McGrath at foia@americanoversight.org or 202.897.4213. Also, if American Oversight's request for expedition is not granted or its 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