



December 19, 2019

VIA ONLINE PORTAL

Kevin Krebs
Assistant Director, FOIA/Privacy Staff
Executive Office for United States Attorneys
U.S. Department of Justice
175 N Street NE
Suite 5.400
Washington, DC 20530-0001
Via FOIAOnline

Re: 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 the U.S. Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

On December 9, 2019, Office of the Inspector General (OIG) released a report of its findings following a review of Foreign Intelligence Surveillance Act (FISA) applications for surveillance of an individual associated with the Trump campaign in the 2016 presidential election.¹ The report concluded that there was a sufficient predicate for the investigation conducted by the Federal Bureau of Investigation (FBI).² Shortly following the release of the report, U.S. Attorney for the District of Connecticut, John Durham, issued a public statement regarding an ongoing investigation that he is conducting at the direction of the Attorney General. Mr. Durham's statement asserted that "last month we advised the Inspector General that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."³ Mr. Durham's public statement regarding the ongoing investigation he is conducting does not conform to DOJ's general practice of

¹ U.S. Dep't of Justice, Office of the Inspector General, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation, Dec. 9, 2019, <https://www.justice.gov/storage/120919-examination.pdf>.

² *Id.*

³ Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the District of Connecticut, Statement of U.S. Attorney John H. Durham, Dec. 9, 2019, <https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham>.



declining to comment on ongoing investigations.⁴ Given the content of Mr. Durham's statement, there are public concerns that it was politically motivated.⁵

American Oversight seeks records with the potential to shed light on whether partisan political considerations affected U.S. Attorney Durham's statement, and on who was involved in crafting the statement.

Requested Records

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

All records reflecting communications (including emails, email attachments, draft documents, 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, talking points, handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of U.S. Attorney John Durham, or any employee or official assisting or supervised by Mr. Durham in the course of his investigation of matters outside his ordinary remit, regarding Mr. Durham's December 9, 2019 statement responding to a report of the Office of the Inspector General.⁶

Please provide all responsive records from December 2, 2019, through December 12, 2019.

Records reflecting communications concerning Mr. Durham's statement with DOJ leadership components, including the Office of Information Policy (OIP), the Office of the Attorney General (OAG), or the Office of the Deputy Attorney General (ODAG) are responsive to this request. In light of Attorney General Barr's direct involvement in managing the Durham investigation,⁷ an adequate search

⁴ Justice Manual, U.S. Dep't of Justice, Title 1, Organization and Function, 1-7.000, Confidentiality and Media Contacts Policy, <https://www.justice.gov/jm/jm-1-7000-media-relations>.

⁵ Matt Zapotosky & Devlin Barrett, *John Durham Has a Stellar Reputation for Investigating Corruption. Some Fear His Work for Barr Could Tarnish It.*, WASH. POST (Dec. 16, 2019, 6:00 AM), https://www.washingtonpost.com/national-security/john-durham-has-a-stellar-reputation-for-investigating-corruption-some-fear-his-work-for-barr-could-tarnish-it/2019/12/15/c68aa568-1d10-11ea-8d58-5ac3600967a1_story.html.

⁶ Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the District of Connecticut, Statement of U.S. Attorney John H. Durham, Dec. 9, 2019, <https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham>.

⁷ Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry Into Its Own Russia Investigation*, N.Y. TIMES, Oct. 24, 2019,

must encompass a search of records reflecting communications with these leadership components.

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."⁸ The public has a significant interest in understanding whether federal prosecutors investigating an extremely politically sensitive matter have made public statements not in accord with DOJ policy for political reasons. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including which government officials influenced U.S. Attorney Durham's December 9, 2019 statement regarding an ongoing investigation. 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.⁹ 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.¹⁰

<https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html>.

⁸ 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ American Oversight currently has approximately 14,700 page likes on Facebook and 86,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 2, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 2, 2019).

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹¹ 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;¹² 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;¹³ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁴ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁵ and 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.¹⁶

Accordingly, American Oversight qualifies for a fee waiver.

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:

¹¹ *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹² *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>.

¹³ *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>.

¹⁴ *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>.

¹⁵ *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>.

¹⁶ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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 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.¹⁷ 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.¹⁸
- 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,¹⁹ and many agencies

¹⁷ 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).

¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁹ 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

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 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

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>.

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,

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