



February 21, 2020

VIA EMAIL

U.S. Department of Defense
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

FOIA Officer
Chief of Naval Operations, DNS-36
2000 Navy Pentagon
Washington, DC 20350-2000
DONFOIA-PA@navy.mil

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 your agency, American Oversight makes the following request for records.

In November 2019, President Trump reportedly intervened to prevent the Navy from proceeding with a fitness review board process that could have resulted in sanctions for Chief Petty Officer Edward Gallagher—a Navy SEAL who was pardoned following a criminal conviction.¹ Shortly after President Trump’s intervention in this case, Navy Secretary Richard Spencer resigned, citing his concerns that the president did not share his views on the importance of discipline and order.² There were multiple accounts given by the president and other administration officials regarding the reasons for Secretary Spencer’s resignation.³ Defense Secretary Esper, reportedly, recommended a replacement for Secretary Spencer—the current Ambassador to Norway, Kenneth Braithwaite—whom

¹ Ashley Parker & Dan Lamothe, *Navy Secretary Forced Out by Pentagon Chief Over Handling of Navy SEAL’s War Crimes Case*, WASH. POST (Nov. 25, 2019, 8:12 AM), <https://www.washingtonpost.com/national-security/2019/11/24/pentagon-chief-asks-navy-secretarys-resignation-over-private-proposal-navy-seals-case/>.

² Ltr. to President Trump, from Richard V. Spencer, Sec’y of the Navy, Nov. 24, 2019, <https://www.cnn.com/2019/11/24/politics/read-navy-secretary-richard-spencer-resignation-letter/index.html>.

³ Parker & Lamothe, *supra* note 1.



the president indicated he would nominate to fill Spencer's post.⁴ In February 2020, public reports indicated that Rear Admiral Collin Green, Commander of the Naval Special Warfare Command, would step down from his post following the president's intervention in Gallagher's case.⁵

Requested Records

American Oversight requests that the Department of Defense (DOD) 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, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (1) Defense Secretary Mark Esper or his chief of staff Eric Chewning, and (2) former Secretary of the Navy Richard V. Spencer.

Please provide all responsive records for this item from November 12, 2019, to November 26, 2019.

2. All email communications (including email messages, calendar invitations, and attachments thereto, and including complete email chains) sent by former Secretary of the Navy Richard V. Spencer containing the following key terms:

- | | |
|-----------------------|--------------------------|
| a. Gallagher | k. Lorange |
| b. Eddie | l. Golsteyn |
| c. Pardon | m. "fitness for service" |
| d. "military justice" | n. "the president" |
| e. "uniform code" | o. "Alpha Platoon" |
| f. "war crime" | p. "SEAL Team 7" |
| g. Discipline | q. Parlatore |
| h. "good order" | r. Mukasey |
| i. "maintain order" | s. Kerik |
| j. "trident pin" | |

American Oversight has limited part two of its request to sent messages of former Secretary Spencer to reduce the volume of potentially responsive records. American Oversight still requests complete email chains. So, for

⁴ *Id.*

⁵ Matthew Cole, *Seal Commander Who Clashed with Trump to Leave Early*, THE INTERCEPT (Feb. 1, 2020, 6:30 AM), <https://theintercept.com/2020/02/01/navy-seal-collin-retire-green-eddie-gallagher/>.

example, if the specified official sent a response to an incoming message containing a key term listed above, the email chain containing the initially received message and the response is responsive to this request.

Please provide all responsive records for this item from November 12, 2019, to November 26, 2019.

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, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of Secretary Esper, Chief of Staff Eric Chewning, and Chairman of the Joint Chiefs, Gen. Mark Milley, regarding former Secretary of the Navy Richard Spencer's communications with the White House about Edward Gallagher's case, including but not limited to records reflecting Secretary Esper's subsequent decision to dismiss Secretary Spencer due to his failure to follow the "chain of command."⁶

Please provide all responsive records for this item from November 12, 2019, to November 26, 2019.

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

⁶ Public reporting indicates that Secretary Esper himself described Secretary Spencer's dismissal as about "chain of command" and said he and the Chairman of the Joint Chiefs, Gen. Mark Milley, were advised by a White House official that Secretary Spencer had approached them with a proposal about the Gallagher case. Further reporting suggests that Secretary Spencer had briefed Secretary Esper's Chief of Staff regarding the approach. See Barbara Starr & Ryan Browne, *Esper 'Flabbergasted' to Learn of Navy Secretary's Secret White House Outreach About Navy Seal*, CNN POLITICS (Nov. 25, 2019, 9:13 PM), <https://www.cnn.com/2019/11/25/politics/esper-spencer-aftermath/index.html>.

public understanding of operations or activities of the government.”⁷ The public has a significant interest in understanding whether and to what extent the White House and the president have affected military discipline in general and for a servicemember accused of serious war crimes. Specifically, records with the potential to shed light on this matter would contribute significantly to public understanding of whether the federal government is failing to hold servicemembers sufficiently accountable for their actions, including due to improper command influence. 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 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

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 15,000 page likes on Facebook and 92,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 15, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 15, 2020).

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>.

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.

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:

- 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 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,¹⁶ and many agencies

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>.

¹⁶ 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

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

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