



March 3, 2020

VIA EMAIL

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 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 State (State), 22 C.F.R. Part 171, American Oversight makes the following request for records.

In April 2019, the International Criminal Court (ICC) rejected ICC Prosecutor Fatou Bensouda's bid to open an investigation into war crimes in Afghanistan, including those potentially committed by U.S. military and intelligence personnel.¹ The court's decision came in the wake of the Trump administration's public opposition to an investigation, including by threatening ICC personnel with criminal prosecution and revoking Prosecutor Bensouda's visa to the United States.² In December 2019, the ICC heard Prosecutor Bensouda's appeal of the court's ruling.³ Although the United States did not appear as a party or send representatives, President Trump's personal attorney Jay Sekulow appeared before the court to argue against an investigation.⁴

¹ International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, Apr. 12, 2019, No. ICC-02/17, https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.

² Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES, Apr. 5, 2019, <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>; John Bolton Threatens ICC with US Sanctions, BBC NEWS, Sept. 11, 2018, <https://www.bbc.com/news/world-us-canada-45474864>.

³ Mike Corder, *Prosecution: ICC Judges Were Wrong to Reject Afghan Probe*, AP, Dec. 5, 2019, <https://apnews.com/99f67073906744d3b9c4b0c4fca8edf9>.

⁴ *Id.*; International Criminal Court, *Decision on the Participation of Amici Curiae, the Office of Public Counsel for the Defence and the Cross-Border Victims*, 24 October 2019, No. ICC-02/17, https://www.icc-cpi.int/CourtRecords/CR2019_06256.PDF.



American Oversight seeks records to shed light on the administration’s recent position toward the ICC, including whether and to what extent the administration coordinated with Sekulow regarding his appearance.

Requested Records

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

1. All email communications (including emails, email attachments, and calendar invitations) sent by (a) any of the State officials listed in Column A to (b) any person or entity listed in Column B, below (including where such persons or entities were copied (cc’ed) or blind copied (bcc’ed)):

Column A: State Officials	Column B: External Entities
<ol style="list-style-type: none"> a. Secretary Mike Pompeo, or anyone communicating on his behalf, such as a scheduler or assistant b. Senior Advisors (to Secretary Pompeo) Mary Kissel and Toni Porter c. Executive Secretary Lisa Kenna d. Senior Counselor to the Secretary T. Ulrich Brechbuhl e. Under Secretary for Management Brian Bulatao f. White House Liaison Nilda Pedrosa, former Liaison Carrie Cabelka, or any other individuals acting in the capacity of White House Liaison or Deputy White House Liaison g. Nathan A. Sales, Acting Under Secretary for Civilian Security, Democracy, and Human Rights h. Pamela D. Pryor, Senior Advisor, Office of the Under Secretary of Civilian Security, Democracy, and Human Rights i. Ambassador to the Netherlands, Pete Hoekstra, or anyone communicating on his 	<ol style="list-style-type: none"> a. Jay Sekulow, or anyone communicating on his behalf such as a scheduler or assistant (including but not limited to the email address sekulow@aclj.org) b. European Centre for Law and Justice (aka European Center for Law and Justice) (including anyone with an email address ending in eclj.org) c. Jordan Sekulow or any other representative of the American Center for Law and Justice (including anyone with an email address ending in aclj.org) d. Christian Advocates Serving Evangelism

behalf, such as a scheduler or assistant	
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Please provide all responsive records from August 1, 2018 through December 31, 2019.

In an effort to accommodate State and reduce the number of responsive records to be processed and produced, American Oversight has limited its request to emails sent by the specified officials above. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both an official's response to an email and the initial received message are responsive to this request and should be produced.

2. All email communications between (a) the below specified officials and (b) anyone in the Executive Office of the President (including anyone with an email address ending in eop.gov) containing any of the following terms:
 - a. Sekulow
 - b. ACLJ
 - c. "American Center for Law and Justice"
 - d. ECLJ
 - e. "European Centre for Law and Justice"
 - f. "European Center for Law and Justice"

Specified Officials:

- i. Secretary Mike Pompeo, or anyone communicating on his behalf, such as a scheduler or assistant
- ii. Senior Advisors (to Secretary Pompeo) Mary Kissel and Toni Porter
- iii. Executive Secretary Lisa Kenna
- iv. Senior Counselor to the Secretary T. Ulrich Brechbuhl
- v. Under Secretary for Management Brian Bulatao
- vi. White House Liaison Nilda Pedrosa, former Liaison Carrie Cabelka, or any other individuals acting in the capacity of White House Liaison or Deputy White House Liaison
- vii. Nathan A. Sales, Acting Under Secretary for Civilian Security, Democracy, and Human Rights
- viii. Pamela D. Pryor, Senior Advisor, Office of the Under Secretary of Civilian Security, Democracy, and Human Rights
- ix. Ambassador to the Netherlands, Pete Hoekstra, or anyone communicating on his behalf, such as a scheduler or assistant

Please provide all responsive records from August 1, 2018 through December 31, 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 public understanding of operations or activities of the government."⁵ The public has a significant interest in understanding whether and to what extent the administration coordinated with the president's personal attorney—who is not a government official—over foreign policy matters involving an international tribunal. Records with the potential to shed light on this question would contribute significantly to public understanding of operations of the federal government, including by understanding whether to what extent private individuals advising the president influence foreign policy. 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.⁶ 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.⁷

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

⁵ 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ American Oversight currently has approximately 15,400 page likes on Facebook and 101,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Feb. 26, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 26, 2020).

posted to its website.⁸ 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;⁹ 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;¹⁰ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹¹ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹² 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.¹³

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:

⁸ *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁹ *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>.

¹⁰ *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>.

¹¹ *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>.

¹² *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>.

¹³ *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.
- 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.¹⁴ 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.¹⁵
- 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 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.

¹⁴ 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).

¹⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

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 Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

- 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 Mehreen Rasheed at foia@americanoversight.org or (202) 848-1320. 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,



Melanie Sloan
Senior Advisor
American Oversight