



April 1, 2020

VIA ONLINE PORTAL

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

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 outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.¹ Since late 2019, the virus has spread to dozens of countries, sickened hundreds of thousands of people, and resulted in tens of thousands of deaths.² This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government. Yet the Trump administration has so far failed to ensure timely availability of testing kits for healthcare providers,³ prevented health experts from speaking about the growing crisis,⁴ and removed information on the spread of the virus from public health resources.⁵ President Trump has consistently downplayed the threat of the virus to public

¹ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

² *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (Apr. 1, 2020, 8:14 AM) <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

³ Alice Park, *Responding to Coronavirus Testing Problems, U.S. Government Expands Number of Labs That Can Run Tests* (Mar. 2, 2020, updated 1:50 PM EST), TIME, <https://time.com/5793605/coronavirus-testing-united-states/>.

⁴ Michael Shear & Maggie Haberman, *Pence Will Control All Coronavirus Messaging from Health Officials*, N.Y. TIMES, Feb. 27, 2020, <https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html>.

⁵ Brianna Ehley, *Trump's Team Shifts Tone from Preventing Coronavirus to Containing It*, POLITICO (Mar. 2, 2020, 7:52 PM), <https://www.politico.com/news/2020/03/02/trump-coronavirus-pence-119051>.



health,⁶ and recently expressly prioritized the economy over American lives.⁷ And although Trump recently issued an executive order invoking the Defense Production Act which would allow the administration to stimulate production by industry of essential equipment for medical and emergency responders, press reports indicate that the administration has failed to meaningfully exercise those authorities to help combat the pandemic.⁸

American Oversight seeks records with the potential to shed light on how the administration is handling this public health emergency.

Requested Records

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

All records reflecting any directive, order, decision, protocols, or guidance regarding the implementation of the Defense Production Act, including any such guidance originating with the White House, any members of the Coronavirus Task Force led by Vice President Pence, or Commerce Department senior leadership.

American Oversight believes your agency is best positioned to determine where responsive records may reside. However, we request that at a minimum, you search the files of the immediate front offices of: the Secretary and Deputy Secretary of Commerce, the Business Liaison, the White House Liaison, the General Counsel, and Legislative and Intergovernmental Affairs, and anyone serving as point of contact for the coronavirus task force led by Vice President Pence.

⁶ Alan Rappoport & Jim Tankersley, *As Stock Markets Plunge, Trump Calls for Economic Response to Coronavirus*, N.Y. TIMES, Mar. 9, 2020, <https://www.nytimes.com/2020/03/09/business/economy/trump-coronavirus-economic-fallout.html>.

⁷ Caitlin Oprysko & Quint Forgey, *'Our Country Wasn't Built to Be Shut Down': Trump Pushes Back Against Health Experts*, POLITICO (Mar. 23, 2020 10:58 P.M.), <https://www.politico.com/news/2020/03/23/trump-coronavirus-lockdown-skepticism-143800>.

⁸ Patrick McDonnell, *What's in Trump's Executive Order on the Defense Production Act*, LAWFARE (Mar. 20, 2020, 3:04 PM), <https://www.lawfareblog.com/whats-trumps-executive-order-defense-production-act>; Kaitlan Collins, *Trump Privately Says He's Facing Pressure Over Refusal to Use Defense Production Act*, CNN (Mar. 23, 2020, 10:44 AM ET), <https://www.cnn.com/2020/03/23/politics/trump-defense-production-act-pressure/index.html>.

Please provide all responsive records from January 30, 2020, through the date of the search.

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."⁹ The public has a significant interest in the federal government's response to the coronavirus. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the role of top officials in implementing policies to mitigate the spread of the disease. 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.¹⁰ 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.¹¹

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.¹² Examples reflecting this commitment to the public disclosure of

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹¹ American Oversight currently has approximately 15,500 page likes on Facebook and 102,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 1, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 1, 2020).

¹² News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

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;¹³ 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;¹⁴ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁵ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁶ 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.¹⁷

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), 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 government activity, and American Oversight is primarily engaged in disseminating the information it received from public records requests to the public.

¹³ *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>.

¹⁴ *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>.

¹⁵ *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>.

¹⁶ *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>.

¹⁷ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Recent reporting demonstrates that there is clearly an urgent need to inform the public regarding the matters that are the subject of American Oversight's FOIA request. First, American Oversight has requested records with the potential to shed light on the steps the administration has undertaken to manage a public health emergency at both national and international levels. Because the virus has spread rapidly and has already killed thousands of people in the United States,¹⁸ there is plainly an urgent need to inform the public about the actions that the government has taken to mitigate the spread and treat the ongoing cases. The exceptionally widespread news reporting on this virus demonstrates that the public urgently needs information concerning the subject matter of this request.¹⁹ Second, factual developments in the last few months have demonstrated a series of government failures to appropriately respond to the pandemic, including failures in the rollout of coronavirus tests,²⁰ and necessary supplies and equipment for patient treatment and the protection of health care workers.²¹

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 testing for coronavirus. American Oversight's request seeks information that can shed light on the role that top government officials have played in the crisis – including the extent to which they were informed about risks and involved in implementing policies designed to mitigate those risks. The public urgently needs the information to understand the extent of the growing health crisis and make decisions that promote public health and mitigate the spread of the disease.

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

¹⁸ *Coronavirus Map: Tracking the Global Outbreak*, *supra* note 2.

¹⁹ *Id.*; Adam Taylor et al., *Live Updates: Italy to Close Schools as Coronavirus Death Toll Passes 100, L.A. County Declares Health Emergency as Cases Mount*, WASH. POST (Mar 4., 2020, 2:38 PM EST), <https://www.washingtonpost.com/world/2020/03/04/coronavirus-live-updates/>; Holly Yan & Kristina Sgueglia, *New York Now Has 6 Coronavirus Cases and City Officials Are Scrambling to Find Who Else Might Have It*, CNN HEALTH (Mar. 4, 2020 12:06 PM EST), <https://www.cnn.com/2020/03/04/health/new-york-coronavirus-cases/index.html>.

²⁰ Park, *supra* note 3.

²¹ Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not With Coronavirus*, N.Y. TIMES (Apr. 1, 2020, 8:28 AM), <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html>; Natasha Bertrand et al., *Pence Task Force Freezes Coronavirus Aid Amid Backlash*, POLITICO (Mar. 31, 2020, 7:55 PM), <https://www.politico.com/news/2020/03/31/pence-task-force-coronavirus-aid-157806>; Barbara Starr & Zachary Cohen, *Pentagon Says It Still Hasn't Sent Ventilators Because It Hasn't Been Told Where to Send Them*, CNN (Mar. 31, 2020, 5:37 PM), https://www.cnn.com/2020/03/31/politics/pentagon-ventilators/index.html?utm_medium=social&utm_term=image&utm_content=2020-03-31T19%3A41%3A07&utm_source=twCNNp.

to satisfy the criteria necessary to qualify for expedition,²² 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.”²³

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.²⁴ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁵

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:

²² 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).

²³ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁴ American Oversight currently has approximately 15,500 page likes on Facebook and 102,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 12, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 12, 2020).

²⁵ 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>.

- 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.²⁶ 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.²⁷
- 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,²⁸ and many agencies

²⁶ 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).

²⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁸ 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 Christine Monahan 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>.

202.869.5244. 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,

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