



April 23, 2020

VIA EMAIL

Federal Emergency Management Agency
FOIA Officer
500 C Street SW, Room 840
Washington, DC 20472
fema-foia@fema.dhs.gov

Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528
foia@hq.dhs.gov

Re: Expedited Freedom of Information Act Request

Dear FOIA Officers:

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 millions of people, and resulted in more than 160,000 deaths.² This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government, and cooperation with state and local officials. In particular, the Federal Emergency Management Agency (FEMA) has assumed a central role in coordinating government-wide efforts to obtain and distribute desperately needed supplies.³

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. 20, 2020, 9:02 AM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

³ *FEMA Supply Chain Task Force Leads Four-Pronged Approach to Securing Needed Supplies and Equipment in COVID-19 Fight*, FEMA, Apr. 7, 2020, <https://www.fema.gov/fema-supply-chain-task-force-leads-four>.



American Oversight seeks records with the potential to shed light on the federal government's management of this public health emergency.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that FEMA produce the following records as soon as practicable, and at least within twenty business days:⁴

1. All records reflecting any directive, protocol, or guidance regarding bidding against state or local governments or healthcare facilities for medical equipment or supplies needed to respond to the coronavirus pandemic, including but not limited to personal protective equipment (PPE), ventilators, testing equipment, or sanitation supplies.

American Oversight is requesting both records issued by FEMA and those in the possession of FEMA that were issued by the White House or other federal authorities, including DHS. Responsive records would include guidance on when it is acceptable and unacceptable to bid against states for supplies, and approval protocols for doing so.

Please search for responsive records from March 1, 2020, through the date of the search.

2. All records reflecting any directive, protocol, or guidance regarding rerouting, taking precedence over, seizing, blockading, or putting a hold on medical supplies or equipment needed to respond to the coronavirus pandemic—including but not limited to personal protective equipment (PPE), ventilators, testing equipment, or sanitation supplies—that had previously been ordered by a state or local official, or administrators of healthcare facilities or emergency medical services.⁵

⁴ In this request, American Oversight seeks records maintained by FEMA. Because it is our understanding that the Department of Homeland Security (DHS) is processing all coronavirus-related records on FEMA's behalf, we are submitting this request to DHS in addition to FEMA. However, we are sending to FEMA for awareness and because, in the event that FEMA regains responsibility for processing such requests, American Oversight expects that this request would then be referred to FEMA for any outstanding processing.

⁵ Public reporting indicates that DHS and other federal agencies have rerouted, seized, taken precedence over or temporarily delayed shipments of supplies ordered by government officials and hospital systems. See, e.g. Zolan Kanno-Youngs & Jack Nicas, 'Swept Up by FEMA': Complicated Medical Supply System Sows Confusion, N.Y. TIMES, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>; Noam N. Levey, *Hospitals Say Feds are Seizing Masks and Other Coronavirus Supplies Without a Word*, L.A. TIMES (Apr. 7, 2020, 2:97 PM),

American Oversight is requesting both records issued by FEMA and those in the possession of FEMA that were issued by the White House or other federal authorities, including DHS.

American Oversight believes your agency is in the best position to know the location of these records. At a minimum, a reasonable search would include the offices of Administrator Graynor, Rear Admiral John Polowczyk, officials leading FEMA's Supply Chain Task Force,⁶ and officials serving on or as a liaison to the White House coronavirus task force.

Please search for responsive records from March 1, 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."⁷ The public has a significant interest in the federal government's response to this national public health emergency.⁸ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including elucidating how FEMA is tracking and responding to states' requests for supplies needed to respond to the pandemic.⁹ American Oversight is committed to transparency and makes

<https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>.

⁶FEMA, *supra* note 3.

⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

⁸ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1.

⁹ See, e.g., Toluse Olorunnipa, et al., *Governors Plead for Medical Equipment From Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020, 3:39 PM), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html; see also Anita Kumar & Gavin Bade, *States Still Baffled Over How to Get Coronavirus Supplies from Trump*, POLITICO (Apr. 13, 2020, 7:02 AM), <https://www.politico.com/states/florida/story/2020/04/13/states-still-baffled-over-how-to-get-coronavirus-supplies-from-trump-1275083>.

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 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 &

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. 9, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 9, 2020).

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

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>.

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 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.¹⁷

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 regulations, 6 C.F.R. Part 5.5(e), 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.¹⁸

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: clarifications of how FEMA is responding to the novel coronavirus pandemic, especially details of how the agency is interacting with states.¹⁹

First, American Oversight has requested records with the potential to shed light on the steps the administration has taken to respond to the novel coronavirus outbreak, which has resulted in a major public health emergency. Because the virus has spread rapidly, has already killed tens thousands of people in the United States,²⁰ there is plainly an urgent need to inform the public about how federal agencies are responding to the virus. While

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>.

¹⁸ 6 C.F.R. § 5.5(e)(ii).

¹⁹ See Toluse, *supra* note 10; *Outbid and Left Hanging, U.S. States Scramble for Ventilators*, Reuters, Apr. 10, 2020, <https://www.nytimes.com/reuters/2020/04/10/us/10reuters-health-coronavirus-usa-ventilators.html?searchResultPosition=14>.

²⁰ *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (Apr. 15, 2020, 6:57 PM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

there is widespread reporting on the equipment shortages faced by healthcare providers, first responders, and essential workers,²¹ there remains considerable confusion—even amongst governors, congresspeople, and healthcare leaders—about how to obtain needed supplies.²² The widespread and exceptional media interest on coronavirus demonstrates that the public urgently needs information about the federal government’s efforts and policies concerning the subject matter of this request.²³

Second, factual developments have demonstrated a series of government failures to appropriately handle decisions regarding the virus, including obscure federal policies leading to confusion amongst governors over how to obtain needed materials,²⁴ as well as an effort by government officials to minimize press coverage and reduce public information²⁵ about the testing of coronavirus cases. There is also widespread public concern that public health officials are being prevented from speaking about the coronavirus²⁶ regarding steps to contain the future spread of the virus, mitigate the outbreaks that have already occurred, and evaluate the effectiveness of the government’s

²¹ See, e.g., *Nurses Push Back on Pressure to Work Without Right Equipment*, WASH. POST (Apr. 16, 2020), https://www.washingtonpost.com/politics/nurses-suspended-for-refusing-covid-19-care-without-n95-mask/2020/04/16/dc0428ce-7f99-11ea-84c2-0792d8591911_story.html; Martin Kaste, *Ventilator Shortages Loom As States Ponder Rules For Rationing*, NPR (Apr. 3, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/04/03/826082727/ventilator-shortages-loom-as-states-ponder-rules-for-rationing>.

²² See, e.g., Zolan, *supra* note 5; Toluse, *supra* note 10.

²³ Adam Taylor et al., *Live Updates: Live updates: Trump to Issue Guidelines on Easing U.S. Coronavirus Restrictions; Unemployment Claims Continue to soar*, Wash. Post (Apr. 16, 2020, 11:20 AM EST), <https://www.washingtonpost.com/world/2020/03/04/coronavirus-live-updates/>; *Coronavirus live updates: California Breaks Grim Record: More Than 100 Deaths Reported in One Day*, L.A. Times (Apr. 16, 2020, 10:38 AM), <https://www.latimes.com/california/liveblog/coronavirus-live-updates-thursday-april-2>; Ben Westcott, et al., *Live Updates: Coronavirus Cases Surpass 2 Million Globally*, CNN (Apr. 16, 2020, 11:43 AM) <https://www.cnn.com/world/live-news/coronavirus-pandemic-04-02-20-intl/index.html>.

²⁴ Zolan, *supra* note 5; Kumar & Bade, *supra* note 10.

²⁵ 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>; Brett Samuels & Peter Sullivan, *Trump Downplays Need for Widespread Testing Before Reopening Economy*, THE HILL (Apr. 9, 2020, 7:55 PM), <https://thehill.com/homenews/administration/492129-trump-downplays-need-for-widespread-testing-before-reopening-economy>.

²⁶ 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>.

response—information that is critical for policymakers, healthcare providers, and the general public.

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 decision regarding coronavirus. American Oversight’s request seeks information that can shed light on FEMA’s policies for managing the measurement of and response to the nation’s supplies needs. The public, including Congresspeople, state officials and healthcare providers, urgently needs the information to understand the extent of the supply-chain 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 to satisfy the criteria necessary to qualify for expedition,²⁷ 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.”²⁸ 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.²⁹ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.³⁰

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:

²⁷ 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).

²⁸ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁹ 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. 14, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 14, 2020).

³⁰ 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

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- 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.³¹ 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.³²
- 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,³³ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching

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>.

³¹ 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).

³² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

³³ 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>.

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 Megan Field at foia@americanoversight.org or

202.897.2465. 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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left of the name.

Austin R. Evers
Executive Director
American Oversight