



April 15, 2020

VIA EMAIL

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
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200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.gov

Freedom of Information Officer
Administration for Children & Families
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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, 45 C.F.R. Part 5, 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 This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government. In the wake of this outbreak, opponents of abortion rights have requested that the Trump Administration reduce or eliminate access to reproductive health care.² Indeed, multiple states have already implemented such restrictions. On March 22, 2020, Texas Governor Greg Abbott issued an executive order postponing non-medically necessary surgeries, including many abortions.³ Similar measures have been

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

² Dennis Carter, *Anti-Abortion Groups Ask Trump's HHS to Use COVID-19 Outbreak to Stop Abortion*, REWIRE NEWS, Mar. 24, 2020, <https://rewire.news/article/2020/03/24/anti-abortion-groups-ask-trumps-hhs-to-use-covid-19-outbreak-to-stop-abortion/>.

³ Tex. Exec. Order No. GA 09, Mar. 22, 2020, https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-



enacted and challenged in Ohio.⁴ On April 7, 2020 the Fifth Circuit Court of Appeals upheld Texas' abortion ban.⁵ During this pandemic, it is crucial that the public be fully informed on states' and federal agencies' decisionmaking on reproductive access.

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

Requested Records

American Oversight requests that your agency process this request on an expedited basis and produce the following records as soon as practicable, and at least within twenty business days:

All decision memoranda, directives, policy interpretations, or guidance signed, approved, or otherwise adopted by Department of Health and Human Services Secretary Azar, Assistant Secretary for Preparedness and Response Dr. Robert Kadlec, Assistant Secretary for Health Brett Giroir, Surgeon General Jerome Adams, or Office of Civil Rights Director Roger Severino, regarding abortion access during the coronavirus outbreak.

This request includes any document establishing, modifying, clarifying, or rescinding any policy, legal or policy interpretation, or practice, whether presented as a memorandum, letter, guidance document, or in any other form.

American Oversight believes that this request for a readily identifiable set of documents from four agency custodians should be assigned to the Simple processing track. American Oversight does not anticipate that this request for final versions of documents will be subject to significant redaction and, as described below, this record concerns a matter of significant public concern. American Oversight therefore expects that your agency can respond expeditiously.

[19_hospital_capacity_IMAGE_03-22-2020.pdf](#); see also, *Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic*, Mar. 23, 2020, <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all#.XnkW2CKrfO8.twitter>.

⁴ Tobias Hoonhout, *Federal Judges Block State-Issued Abortion Bans in Texas, Ohio*, NAT'L REV. (Mar. 31, 2020, 8:13 AM), <https://www.nationalreview.com/news/federal-judges-block-state-issued-abortion-bans-in-texas-ohio/>.

⁵ Emma Platoff, *Texas Can Enforce Abortion Ban During Coronavirus Pandemic, Federal Appeals Court Rules*, TEX. TRIBUNE, Apr. 7, 2020, <https://www.texastribune.org/2020/04/07/texas-abortion-ban-can-remain-place-during-coronavirus-court-rules/>.

Please provide all responsive records from January 15, 2020, through the date of your 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."⁶ The public has a significant interest in understanding whether and to what extent federal health officials are communicating or coordinating with anti-abortion organizations in the midst of a public health emergency.⁷ 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

⁶ 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ Carter, *supra* note 2.

⁸ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ 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).

¹⁰ 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;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 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 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.¹⁵

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 45 C.F.R. § 5.27(b), 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.

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>.

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>.

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's response to the novel coronavirus outbreak, which has resulted in a major public health emergency. Because the virus has spread rapidly and has already killed thousands of people in the United States,¹⁶ there is plainly an urgent need to inform the public about what the administration knew when regarding the severity of the threat posed by this new virus. The exceptionally widespread news reporting on coronavirus demonstrates that the public urgently needs information about the federal government's efforts and policies concerning the subject matter of this request.¹⁷ Second, factual developments have demonstrated a series of government failures to appropriately handle decisions regarding the virus, including failures in the rollout of coronavirus tests and overly restrictive testing protocols,¹⁸ as well as an effort by government officials to minimize press coverage and reduce public information¹⁹ about the testing of coronavirus cases. There is also widespread public concern that public health officials are being prevented from speaking about the coronavirus more broadly²⁰—information that is critical for educating the public on steps to contain the future spread of the virus, mitigate the outbreaks that have already occurred, and evaluate the effectiveness of the government's response.

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 how and why decisions have been made—including whether and to what extent federal health policy currently supports reductions or limitations to reproductive health care during this time. The public urgently

¹⁶ 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>.

¹⁷ Abutaleb, *supra* note 3; Shear, *supra* note 3; 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>.

¹⁸ Abutaleb, *supra* note 3; Alice Park, *Responding to Coronavirus Testing Problems, U.S. Government Expands Number of Labs That Can Run Tests*, TIME, (Mar. 2, 2020, updated 1:50 PM EST), <https://time.com/5793605/coronavirus-testing-united-states/>.

¹⁹ 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>.

²⁰ 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>.

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 to satisfy the criteria necessary to qualify for expedition,²¹ 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."²² 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.²³ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁴

Accordingly, American Oversight's request satisfies the criteria for expedition.

²¹ 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).

²² *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²³ 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).

²⁴ 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>.

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:

- 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.²⁵ 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.²⁶
- 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,²⁷ 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

²⁵ 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).

²⁶ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁷ 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>.

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 Khahilia Shaw at foia@americanoversight.org or

202.539.6507. 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". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Austin R. Evers
Executive Director
American Oversight