



May 22, 2020

VIA EMAIL/FOIA ONLINE

Privacy Office
Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, DC 20528
foia@hq.dhs.gov

FOIA Office
Customs and Border Protection
1300 Pennsylvania Avenue NW
Room 3.3D
Washington, DC 20229
Via FOIAOnline

Re: 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.

On March 20, 2020, the Trump administration halted the processing of asylum claims at U.S. ports of entry—a dramatic crackdown on individuals seeking humanitarian protection in the United States, and the first time since the passage of the Refugee Act thirty years ago that individuals arriving in the United States have been given no ability to seek asylum.¹ The administration simultaneously issued rulemaking from the Centers for Disease Control and Prevention (CDC)² alongside an order from CDC,³ to effect the halt of asylum processing as a result of the spread of coronavirus. After an initial extension of the order in April,⁴ CDC indefinitely extended the order in May until “the danger of further introduction of COVID-19 into the United States has ceased to be a serious

¹ Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020, 6:30 PM), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

² Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) (to be codified at 42 C.F.R. Part 71).

³ Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020).

⁴ Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22,424 (Apr. 20, 2020).



danger.”⁵ Although the administration appears to be using laws regarding quarantine power to trump laws regarding asylum rights, agency officials have made no public justification to that effect, and their actions appear to be potentially in violation of immigration law.⁶

Press reporting suggests that Stephen Miller, President Trump’s adviser on immigration and the architect of the administration’s hardline immigration policies, has long pushed using public health powers to crack down on immigration and has seized the coronavirus crisis to effect these changes.⁷

American Oversight seeks to shed light on whether and to what extent the administration used a public health emergency to advance longstanding hardline immigration goals.

Requested Records

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

All guidance or directives from the White House, Department of Homeland Security (DHS) leadership, Customs and Border Protection (CBP),⁸ HHS, CDC, or State Department leadership regarding the issuance *or* implementation of:

- a. HHS’s and CDC’s March 20, 2020 rulemaking amending Section 362 of the Public Health Services Act to provide a procedure for CDC to suspend the introduction of persons from designated countries;
- b. CDC’s March 20, 2020 order under Sections 362 and 365 of the Public Health Services Act regarding the suspension of the introduction of persons from countries where a communicable disease exists;

⁵ Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, Order under Sections 362 and 365 of the Public Health Service Act, May 19, 2020, https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal_5-19-20-p.pdf; Michael Shear & Zolan Kanno-Youngs, *Trump Administration Plans to Extend Virus Border Restrictions Indefinitely*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/politics/trump-coronavirus-border-restrictions.html>.

⁶ Lind, *supra* note 1.

⁷ Caitlin Dickerson & Michael Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES, May 3, 2020, <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>.

⁸ Press reporting indicates that CBP internally refers to their implementation of this rulemaking and order as Operation Capio, and therefore a search for responsive records at CBP should include records regarding the implementation of Operation Capio. *See* Lind, *supra* note 1.

- c. CDC's April 20, 2020 extension of the March 20, 2020 order under Sections 362 and 365 of the Public Health Services Act regarding the suspension of the introduction of persons from countries where a communicable disease exists; and/or
- d. CDC's May 19, 2020 amendment and extension of the March and April orders under Sections 362 and 365 of the Public Health Services Act regarding the suspension of the introduction of persons from countries where a communicable disease exists.

American Oversight believes a search for responsive should include the immediate front offices (including leadership and staff support) of the DHS Secretary, DHS General Counsel, DHS White House Liaison, CBP Commissioner, CBP Deputy Commissioner, Chief of Border Patrol, CBP Office Field Operations, CBP Chief Counsel, and CBP White House Liaison.

Please provide all responsive records from January 1, 2020, through the date the search is conducted.

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 pandemic, including the administration's decision to halt asylum processing in apparent contravention of immigration law.¹⁰ Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent current public health decisions are being driven by the White House's hardline immigration advocates, who have long pushed using public health law to cut back on immigration,¹¹ and whether analyses were conducted on the legality of these immigration policy changes.¹² American Oversight is

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ Lind, *supra* note 1; Guttentag & Bertozzi, *Trump Is Using the Pandemic to Flout Immigration Laws*, N.Y. TIMES, May 11, 2020, <https://www.nytimes.com/2020/05/11/opinion/trump-coronavirus-immigration.html>.

¹¹ Dickerson & Shear, *supra* note 7.

¹² Lind, *supra* note 1; Guttentag & Bertozzi, *supra* note 13.

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.¹³ 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.¹⁴

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.¹⁵ 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;¹⁶ 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;¹⁷ posting records regarding potential self-dealing at the Department of Housing &

¹³ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁴ 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 May 21, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 21, 2020).

¹⁵ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹⁶ *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>.

¹⁷ 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;¹⁸ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹⁹ 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.²⁰

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:

- 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

¹⁸ *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>.

¹⁹ *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>.

²⁰ *Sessions’ Letter Shows DOJ Acted on Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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.²¹ 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.²²
- 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,²³ 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.
- 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

²¹ 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).

²² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²³ 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>.

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 202.869.5244. 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,



Austin R. Evers
Executive Director
American Oversight