



May 6, 2020

VIA ELECTRONIC MAIL

U.S. Department of Labor - OSHA  
FOIA Officer Christopher Durso  
Rm. N3647  
200 Constitution Ave., NW  
Washington, D.C. 20210  
[foiarequests@dol.gov](mailto:foiarequests@dol.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 Department of Labor (DOL), 29 C.F.R. Part 70, 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.<sup>1</sup> Since late 2019, the virus has spread to dozens of countries, sickened millions of people, and resulted in more than 200,000 deaths, including more than 68,000 in the U.S. alone.<sup>2</sup> Despite the clear danger of coronavirus to public safety, many in essential industries have continued to work without adequate protective equipment or protocols to mitigate the virus's spread.<sup>3</sup> Though thousands have submitted complaints about dangerous working conditions,<sup>4</sup> the Occupational Safety and Health Administration (OSHA), the primary agency responsible for protecting the health and safety of workers, has notified its inspectors to use discretion when issuing citations for violations of its guidelines for

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

<sup>2</sup> *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (May 5, 2020, 8:18 AM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

<sup>3</sup> Michael Grabell et al., "Left Out of COVID-19 Workplace Safety Protections, Thanks to OSHA," PROPUBLICA (Apr. 16, 2020, 7:52 PM) <https://www.propublica.org/article/millions-of-essential-workers-are-being-left-out-of-covid-19-workplace-safety-protections-thanks-to-osh>.

<sup>4</sup> Noam Scheiber and Michael Corkery, "Missouri Pork Plant Workers Say They Can't Cover Mouths to Cough," N.Y. TIMES, Apr. 24, 2020, <https://www.nytimes.com/2020/04/24/business/economy/coronavirus-smithfield-meat.html>.



preventing the spread of coronavirus.<sup>5</sup> Especially as governments and businesses weigh the risks and benefits of reopening certain sectors of the economy,<sup>6</sup> it is crucial that they make such decisions knowing the full extent of potential dangers and assuming that employers will adhere to OSHA and CDC guidelines to mitigate those dangers.

American Oversight seeks records with the potential to shed light on how the coronavirus has already affected workers and on OSHA's decision making concerning the enforcement of health and safety protocols during the pandemic.

### **Requested Records**

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

Records sufficient to identify:

1. The number of formal or informal workplace complaints or referrals received related to COVID-19, when these complaints were received, as well as how many were coded as alleging fatality, imminent danger or high-risk exposure, or medium or lower risk exposure;
2. The number of inspections conducted by OSHA related to COVID-19, when, where, and for which employer and in which industry these inspections took place, whether the inspections found alleged violations of OSHA standards, whether these violations were "willful," "serious," "other than serious," or "repeated," and whether a citation was issued as a result of the inspection;
3. The number of citations or penalties issued coded as relating to COVID-19, when and for which employer and in which industry the citations or penalties were issued, whether these penalties or citations were appealed, and the monetary amounts of any proposed penalties.

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

To the extent your agency maintains this data in aggregated form, such as in a spreadsheet or within a database or other format that can be readily exported to a spreadsheet, American Oversight requests responsive data in such format. In

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<sup>5</sup> *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, April 13, 2020, <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

<sup>6</sup> Ben Casselman, "Reopening Has Begun. No One Is Sure What Happens Next," N.Y. TIMES, April 25, 2020 (updated April 28, 2020), <https://www.nytimes.com/2020/04/25/business/economy/coronavirus-economy-reopening.html>.

addition to records in the form of spreadsheets and tables, this request encompasses records in the form of final memoranda, reports, and talking points. To be clear, American Oversight does not object to the redaction of certain details, e.g., individual names or other identifying information, from records responsive to this request.

American Oversight believes that your office is in the best position to know where responsive documents would be located. At a minimum, a reasonable search would include searching the records—including email and electronic filing systems—of the Commissioner, the Commissioner’s Chief of Staff, the Deputy Assistant Secretary, the Deputy Director for Standards and Guidance, the Deputy Director for Whistleblower Protection Programs, the Deputy Director for Technical Support and Emergency Management, the Director for Enforcement Programs, the Director of the Office of Statistical Analysis, and any official advising the Commissioner on the department’s response to the coronavirus emergency.

### **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.”<sup>7</sup> The public has a significant interest in the federal government’s response to the coronavirus, given the massive economic and public health ramifications.<sup>8</sup> Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the significant role of OSHA in ensuring workplace safety during the pandemic.<sup>9</sup> 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.<sup>10</sup> 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.

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>8</sup> See *supra* note 2.

<sup>9</sup> See *supra* note 3.

<sup>10</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

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.<sup>11</sup>

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.<sup>12</sup> 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;<sup>13</sup> 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;<sup>14</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>15</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>16</sup> 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

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<sup>11</sup> American Oversight currently has approximately 15,400 page likes on Facebook and 102,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 5, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 5, 2020).

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

<sup>13</sup> 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>.

<sup>14</sup> 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>.

<sup>15</sup> *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>.

<sup>16</sup> *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>.

political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.<sup>17</sup>

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.
- 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.<sup>18</sup> 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.<sup>19</sup>
- 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,<sup>20</sup> and many agencies

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

<sup>18</sup> *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).

<sup>19</sup> *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

<sup>20</sup> 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

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 Emma Lewis at [foia@americanoversight.org](mailto:foia@americanoversight.org) or

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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) 919-6303. 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