



May 29, 2020

VIA FOIAOnline

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

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Department of Commerce (Commerce) implementing regulations, 15 C.F.R. Part 4, 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 American Oversight seeks records to shed light on the Department of Commerce’s response to the novel coronavirus pandemic.

Requested Records

American Oversight requests that Commerce produce the following within twenty business days:

1. All email communications (including complete email chains, email attachments, calendar invitations, and attachments thereto) between (a) any of the Commerce officials listed in Column A below and (b) any individual listed in Column B below.

Column A: Commerce Officials	Column B: External Individuals
<ul style="list-style-type: none"> i. Secretary Wilbur Ross, Director, or anyone communicating on his behalf, such as a scheduler or assistant, including Talat Goudarzi ii. Karen Dunn Kelley, Deputy Secretary iii. Michael J. Walsh Jr., Chief of Staff iv. Anyone serving as General Counsel, including in an acting capacity 	<ul style="list-style-type: none"> i. Kris Kobach (including, but not limited to, communications with the email addresses kkobach@gmail.com, kris@kriskobach.com, or any email addresses ending in ks.gov) ii. J. (John) Christian Adams (including, but not limited to, communications with the email addresses adams@publicinterestlegal.org, a@electionlawcenter.com, or adams@electionlawcenter.com)

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



<ul style="list-style-type: none"> v. Anyone serving as White House Liaison or White House Advisor, including in an acting capacity vi. Anyone serving as point of contact for the coronavirus task force led by Vice President Pence. 	<ul style="list-style-type: none"> iii. Hans von Spakovsky (including, but not limited to, communications with the email address hans.vonspakovsky@heritage.org) iv. Catherine Engelbrecht (including, but not limited to, communications with the email address catherine@truethevote.org) v. Edward Blum vi. John C. Eastman vii. Leonard Leo (including, but not limited to, communications with the email address)
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Please provide all responsive records from January 1, 2020, through the date the search is conducted.

2. All email communications (including complete email chains, email attachments, calendar invitations, and attachments thereto) sent by (a) any of the Commerce officials listed in Column A below to (b) any employee or representative of any of the entities listed in Column B below.

Column A: Commerce Officials	Column B: External Entities
<ul style="list-style-type: none"> i. Secretary Wilbur Ross or anyone communicating on his behalf, such as a scheduler or assistant, including Talat Goudarzi ii. Karen Dunn Kelley, Deputy Secretary iii. Michael J. Walsh Jr., Chief of Staff iv. Anyone serving as General Counsel, including in an acting capacity v. Anyone serving as White House Liaison or White House Advisor, including in an acting capacity vi. Anyone serving as point of contact for the coronavirus task force led by Vice President Pence. 	<ul style="list-style-type: none"> i. Anyone communicating on behalf of the Election Law Center (including, but not limited to, communications with any email address ending in electionlawcenter.com) ii. Anyone communicating on behalf of the Government Accountability Institute (including, but not limited to, communications with any email address ending in g-a-i.org) iii. Anyone communicating on behalf of Simpatico Software Systems (including, but not limited to, communications with any email address ending in simpaticosoftware.com) iv. Anyone communicating on behalf of Judicial Watch (including, but not limited to, communications with any email address ending in judicialwatch.org) v. Anyone communicating on behalf of Heritage Foundation (including, but not limited to, communications with any email address ending in heritage.org) vi. Anyone communicating on behalf of Heritage Action for America (including, but not limited to,

	<p>communications with any email address ending in heritageaction.com)</p> <p>vii. Anyone communicating on behalf of Public Interest Legal Foundation (including, but not limited to, communications with any email address ending in publicinterestlegal.org)</p> <p>viii. Anyone communicating on behalf of American Civil Rights Union (including, but not limited to, communications with any email address ending in theacru.org)</p> <p>ix. Anyone communicating on behalf of True the Vote (including, but not limited to, communications with any email address ending in truethetvote.org)</p> <p>x. Anyone communicating on behalf of the Republican State Leadership Committee (including, but not limited to, communications with any email address ending in rslc.gop)</p> <p>xi. Anyone communicating on behalf of the National Republican Redistricting Trust (including, but not limited to, communications with any email address ending in thenrrt.org)</p> <p>xii. Anyone communicating on behalf of Geographic Strategies LLC</p> <p>xiii. Anyone communicating on behalf of Fair Lines America</p> <p>xiv. Anyone communicating on behalf of Federation for American Immigration Reform (including, but not limited to, communications with any email address ending in @fairus.org)</p> <p>xv. Anyone communicating on behalf of the Immigration Reform Law Institute (including, but not limited to, communications with any email address ending in @irli.org)</p> <p>xvi. Anyone communicating on behalf of Center for Immigration Studies (including, but not limited to, communications with any email address ending in @cis.org)</p>
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	<p>xvii. Anyone communicating on behalf of NumbersUSA (including, but not limited to, communications with any email address ending in @numbersusa.com)</p> <p>xviii. Anyone communicating on behalf of the Hoover Institution (including, but not limited to, communications with any email address ending in hoover.org)</p> <p>xix. Anyone communicating on behalf of the Project on Fair Representation (including, but not limited to, communications with any email address ending in projectonfairrepresentation.org)</p> <p>xx. Anyone communicating on behalf of the Judicial Education Project</p> <p>xxi. Anyone communicating on behalf of the Federalist Society (including, but not limited to, communications with any email address ending in fed-soc.org)</p> <p>xxii. Anyone communicating on behalf of the Freedom and Opportunity Fund</p> <p>xxiii. Anyone communicating on behalf of Creative Response Concepts (including, but not limited to, communications with any email address ending in crcadvisors.com or crcadvisors.org)</p> <p>xxiv. Anyone communicating on behalf of the Honest Elections Project (including, but not limited to, communications with any email address ending in honestelections.org)</p> <p>xxv. Anyone communicating on behalf of the 85 Fund</p> <p>xxvi. Anyone communicating on behalf of the Judicial Crisis Network (including, but not limited to, communications with any email address ending in judicialnetwork.org)</p> <p>xxvii. Anyone communicating on behalf of Consovoy McCarthy (including, but not limited to, communications with any email address ending in consovoymccarthy.com)</p>
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In an effort to accommodate the agency and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by the listed officials and employees. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. This means, for example, that both an agency official's response to an email from a listed entity and the initial received message are responsive to this request and should be produced.

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."² The public has a significant interest in the accuracy of the decennial census, which is run by a subcomponent of the Commerce Department and determines congressional representation and distribution of federal and state funds for the next decade.³ In addition, it has been widely reported that the novel coronavirus pandemic has significantly affected the agency's ability to conduct the census, delaying implementation of the counting measures put in place in order to get an accurate count of the population.⁴ 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 the Commerce Department is influenced by external entities in planning for and implementing the census during a pandemic. The individuals and entities listed have a vested interest in the outcome of the decennial census, and therefore an interest in the implementation of the census. Email communications sent or received by Commerce officials from the listed individuals as well as email communications sent by Commerce officials to the listed entities would shed light on the individuals and organizations outside the government that these officials believe have significant enough value to add to their decision-making process that they deserve the time and energy of a response. Records responsive to this request would shed light on individuals and entities whose voices are being heard at the Department of Commerce. 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.

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ See, e.g., Jim Tankersley & Emily Baumgaertner, *Here's Why an Accurate Census Count Is So Important*, N.Y. TIMES, Mar. 27, 2018, <https://www.nytimes.com/2018/03/27/us/politics/census-citizenship-question.html>.

⁴ See, e.g., Hansi Lo Wang, *In 13 States, Census Bureau to Resume Hand-Delivering Forms, Hiring Workers*, NPR (May 4, 2020, 8:28 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/04/850371670/in-13-states-census-bureau-to-resume-hand-delivering-forms-hiring-workers> (stating that field operations were "suspended in March because of the coronavirus pandemic.").

This request is primarily and fundamentally for non-commercial purposes.⁵ 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.⁶

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.⁷ 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;⁸ 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;⁹ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁰ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹¹ 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.¹²

Accordingly, American Oversight qualifies for a fee waiver.

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ 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. 10, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 10, 2020).

⁷ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁸ *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>.

⁹ *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>.

¹⁰ *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>.

¹¹ *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>.

¹² *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:

- 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.¹³ 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.¹⁴
- 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,¹⁵ 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 records potentially responsive to this request are likely to be located on systems where they are subject to potential

¹³ 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).

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

¹⁵ 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>.

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

Austin R. Evers
Executive Director
American Oversight