



June 5, 2020

VIA EMAIL

Hirsh D. Kravitz
FOIA, Records, and E-Discovery Office
Civil Division
Department of Justice
Room 8314
1100 L Street NW
Washington, DC 20530-0001
Civil.routing.FOIA@usdoj.gov

Re: Freedom of Information Act Request

Dear Mr. Kravitz:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the U.S. Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

After insisting that employees of his presidential campaign sign nondisclosure agreements (NDAs), President Trump made headlines when he pushed for similar NDAs for White House staff.¹ NDAs for government employees covering unclassified information implicate free speech concerns and are constitutionally suspect.² The Trump Campaign, for its part, has attempted to enforce its NDAs against various former staffers, to varying degrees of success.³

¹ See, e.g., Kaitlan Collins, *Senior White House Staff Signed Nondisclosure Agreements at Trump's Request*, CNN POLITICS (Mar. 21, 2018, 5:07 PM), <https://www.cnn.com/2018/03/21/politics/donald-trump-white-house-nondisclosure-agreements/index.html>.

² See, e.g., Jody Woodruff, *Nondisclosure Agreements Are Rare in Government. Here's Why*, PBS NEWS HOUR (Aug. 14, 2018, 6:35 PM), <https://www.pbs.org/newshour/show/nondisclosure-agreements-are-rare-in-government-heres-why>.

³ See, e.g., Deanna Paul, *Trump Accused Omarosa Manigault Newman of Breaching Her NDA. Experts Say She Might Prevail in Court*, WASH. POST (Aug. 15, 2018, 10:31 AM), <https://www.washingtonpost.com/news/politics/wp/2018/08/14/trump-accused-omarosa-of-breaching-her-nda-experts-say-she-might-prevail-in-court/>.



In January 2019, after former campaign staffer and White House employee Cliff Sims published a tell-all book about his time in the White House, the Trump Campaign filed a case with the American Arbitration Association in an effort to enforce Sims' campaign NDA.⁴ Though it was unclear whether the Campaign or the president also sought to enforce any NDAs Sims may have signed in connection with his White House employment, Sims shortly thereafter filed suit in federal court, claiming the Campaign was operating at the president's behest and stifling his First Amendment rights.⁵ In August 2019, the Court declined to grant defendants' motion to dismiss, instead staying the case pending a decision in another case relevant to civil actions against the president.⁶ A few months later and without fanfare or explanation, on December 4, 2019, the parties stipulated to dismissal of the case.⁷

American Oversight seeks records with the potential to shed light on whether and to what extent arbitration over any of Sims' NDAs impacted his federal lawsuit against the president.

Requested Records

American Oversight requests that the Civil Division produce the following records within twenty business days:

All communications (including emails, email attachments, text messages, calendar invitations, letters, memoranda, or other communications) between (a) any arbitrator (or their staff) working on the arbitration between Donald J. Trump for President Inc. and Clifton "Cliff" Sims or any representative of the American Arbitration Association,⁸ and (b) any of the following Civil Division personnel:

⁴ Leada Gore, *Trump Reportedly Suing Cliff Sims Over Tell-All Book*, AL.COM (Jan. 31, 2019), <https://www.al.com/news/2019/01/trump-reportedly-suing-cliff-sims-over-tell-all-book.html>.

⁵ Quint Forgey, *Ex-White House Aide Sues Trump*, POLITICO (Feb. 11, 2019, 9:27 PM), <https://www.politico.com/story/2019/02/11/cliff-sims-sues-trump-1164558>.

⁶ Eriq Gardner, *Judge Is Hesitant About Ordering Trump to Back Off Nondisclosure Agreements*, HOLLYWOOD REPORTER (Aug. 1, 2019, 8:35 AM), <https://www.hollywoodreporter.com/thr-esq/judge-is-hesitant-ordering-trump-back-nondisclosure-agreements-1228516>.

⁷ Joint Stipulation of Dismissal with Prejudice, *Clifton David Sims v. Donald J. Trump et al.*, Case No. 1:19-cv-00345 (D.D.C. Dec. 4, 2019).

⁸ Representatives of the American Arbitration Agreement may communicate via email addresses ending in @adr.org. However, individual arbitrators and their staff may communicate from other email domains (and to be clear, this request is not limited to email communications). American Oversight believes that an adequate search for responsive records to each item of this request would include making inquiries of the custodians.

- i. Assistant Attorney General Jody Hunt, and anyone communicating on his behalf, such as an assistant, chief of staff, or scheduler
- ii. Principal Deputy Assistant Attorney General Ethan Davis
- iii. Deputy Assistant Attorney General, Federal Programs Branch, James Burnham
- iv. Deputy Director for Federal Programs Elizabeth Shapiro
- v. Assistant Director for Federal Programs Christopher Hall
- vi. Trial Attorney Julie Straus Harris
- vii. Any other trial attorneys who worked on civil action number 19-00345

Please provide all responsive records from August 1, 2019, through December 4, 2019.

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 whether and to what extent the administration has endeavored to stifle free speech, including reports of potentially unethical or unlawful conduct. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether any behind-the-scenes arbitration or litigation may have impacted the government's position on enforcing NDAs it has required federal employees to sign. 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.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

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ *See id.*

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 & 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

¹¹ American Oversight currently has approximately 15,500 page likes on Facebook and 102,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 23, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 23, 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>.

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>.

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 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.¹⁸ 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

¹⁸ 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).

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.¹⁹

- 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,²⁰ 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 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

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

²⁰ 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>.

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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. 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", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight