



June 1, 2020

VIA ONLINE PORTAL

Sarah Kotler
FOIA Officer
Food and Drug Administration
5630 Fishers Lane, Room 1035
Rockville, MD 20857
Via Online Portal

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, 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 Since late 2019, the virus has spread across the globe, sickened millions of thousands of people, and resulted in hundreds-of-thousands of deaths.² This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government.

American Oversight seeks to shed light on the federal government's response to this pandemic.

Requested Records

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

All email communications (including emails, complete email chains, email attachments, calendar invitations, and calendar invitation attachments) from the internal White House "Covid Mail" email address,* as reported on by the

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

² *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (May 18, 2020, 8:24 AM), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.



Washington Post,³ that were either directly received by or forwarded to the government officials listed below.

- i. Commissioner Stephen Hahn, and anyone communicating on his behalf, including assistants and schedulers
- ii. Chief of Staff Keagan Lenihan
- iii. Principal Deputy Commissioner Amy Abernethy
- iv. Director of the Center for Drug Evaluation and Research Janet Woodcock
- v. Chief Counsel Stacy Amin
- vi. Anyone serving as head of the Office of External Affairs
- vii. Anyone serving as White House Liaison or as point person to the White House coronavirus task force

*The *Washington Post* article does not identify the specific email address for the “Covid Mail” account, but American Oversight expects that your agency will be able to identify and search for this account based upon the information provided here and inquiries to agency employees who are familiar with the subject matter of the request.

Please provide all responsive records from March 1, 2020, through the date of the 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.

³ See Ashley Parker, et al., *Under Trump, Coronavirus Scientists Can Speak --- As Long As They Mostly Toe the Line*, WASH. POST (Apr. 22, 2020, 8:20 PM), https://www.washingtonpost.com/politics/under-trump-coronavirus-scientists-can-speak-as-long-as-they-toe-the-line/2020/04/22/a0a67c12-84b9-11ea-878a-86477a724bdb_story.html (“An internal White House ‘Covid Mail’ email address, for instance, exists to receive queries and suggestions from ‘friends and family’ as well as random individuals — including doctors and business owners — from around the country who have reached out to White House officials. Those emails then get farmed out to the appropriate agencies — from the Food and Drug Administration to the Department of Health and Human Services — but some officials have privately worried that these missives receive priority and distract from more crucial scientific pursuits. . . . Ideas passed along through the internal ‘Covid Mail’ email system are routed largely to the health agencies. There have been messages to the FDA on testing, to the CDC on surveillance and epidemiology; and to NIH on vaccines.”).

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.”⁴ The public has a significant interest in the federal government’s response to the coronavirus. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the federal government is prioritizing the interests of friends or allies of the president in formulating its response.⁵ 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.⁶ 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.⁷

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.⁸ 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;⁹ 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

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ See Parker et al., *supra* note 3.

⁶ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ American Oversight currently has approximately 15,600 page likes on Facebook and 102,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 18, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 18, 2020).

⁸ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁹ 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>.

a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁰ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹¹ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹² 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.¹³

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and your agency's regulations, 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.

Recent reporting demonstrates that there is clearly an urgent need to inform the public about the subject of American Oversight's FOIA request: whether and to what extent federal officials are giving special treatment to friends and allies of the president, instead of prioritizing requests for or offers of assistance based on merit and need.¹⁴ American Oversight has requested records with the potential to shed light on the use of an internal "COVID mail" system to forward missives from "friends and family" of White House officials to agency officials leading the government's response to the coronavirus

¹⁰ 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>.

¹¹ *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>.

¹² *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>.

¹³ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁴ See Parker et al., *supra* note 3.

pandemic.¹⁵ Because the virus has spread rapidly and has already killed nearly 90,000 people in the United States,¹⁶ there is plainly an urgent need to inform the public about how the federal government is responding to the virus. The widespread media interest 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 For example, there is widespread reporting on the equipment shortages faced by healthcare providers, first responders, and essential workers,¹⁸ and the considerable confusion—even amongst governors, congresspeople, and healthcare leaders—about how to obtain needed supplies amidst, amidst competing governmental task forces and evolving procedures.¹⁹ There has also been widespread reporting regarding political pressure trumping scientific expertise in the government's response to the epidemic, most notably, but not limited to, with respect to the use of hydroxychloroquine to combat COVID-19.²⁰

¹⁵ *Id.*

¹⁶ *Coronavirus in the U.S.: Latest. Map and Case Count*, N.Y. TIMES (May 18, 2020, 2:07 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

¹⁷ John Wagner, et al., *Live Updates: Trump, Reversing Course, Says Coronavirus Task Force Will Continue 'Indefinitely'*, WASH. POST (May 6, 2020, 3:22 PM EST),

<https://www.washingtonpost.com/nation/2020/05/06/coronavirus-update-us/>;

Coronavirus Live Updates: California Breaks Grim Record: More Than 100 Deaths Reported in One Day, L.A. TIMES (Apr. 16, 2020, 10:38 AM),

<https://www.latimes.com/california/liveblog/coronavirus-live-updates-thursday-april-2>;

Meg Wagner, et al., *Live Updates: No States Meet All the Criteria for Reopening, Health Scholar Says*, CNN (May 6, 2020, 3:28 PM), https://www.cnn.com/us/live-news/us-coronavirus-update-05-06-20/h_ed73f0f5aa5c0e04163d4c0da8b2c2b8.

¹⁸ See, e.g., Parker et al., *supra* note 3.

¹⁹ See, e.g., Rachael Levy, *Volunteers in Coronavirus Response Ruffle Some at FEMA*, WALL

STREET JOURNAL (Apr. 21, 2020, 2:37 PM), <https://www.wsj.com/articles/volunteers-in-coronavirus-response-ruffle-some-at-fema-11587489141>;

Anita Kumar & Gavin Bade, *States Still Baffled Over How to Get Coronavirus Supplies from Trump*, POLITICO (Apr. 13, 2020, 7:02 AM), <https://www.politico.com/states/florida/story/2020/04/13/states-still-baffled-over-how-to-get-coronavirus-supplies-from-trump-1275083>;

Toluse Olorunnipa, et al., *Governors Plead for Medical Equipment From Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020, 3:39 PM),

https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html;

¹⁹ See 5 U.S.C. § 552(a)(4)(A)(iii).

²⁰ See, e.g., Parker et al., *supra* note 3; Katherine Eban, "Really Want to Flood NY and NJ":

Internal Documents Reveal Team Trump's Chloroquine Master Plan, VANITY FAIR (Apr. 24, 2020), <https://www.vanityfair.com/news/2020/04/internal-documents-reveal-team-trumps-chloroquine-master-plan>;

Lisette Voytko, *Trump Has 'Small,' 'Distant Link' To Sanofi, French Drugmaker Of Hydroxychloroquine*, FORBES (Apr. 7, 2020, 12:55 PM),

<https://www.forbes.com/sites/lisettevoytko/2020/04/07/trump-has-small-distant-link-to-sanofi-french-drugmaker-of-hydroxychloroquine/#2169e7fb7260>; Philip Bump, *Trump's*

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 whether and to what extent federal officials are engaged in political favoritism in responding to the pandemic.

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

Promotion of Hydroxychloroquine is Almost Certainly About Politics, Not Profits, WASH. POST (Apr. 7, 2020, 11:24 AM),

<https://www.washingtonpost.com/politics/2020/04/07/trumps-promotion-hydroxychloroquine-is-almost-certainly-about-politics-not-profits/>; Peter Baker, et al., *Trump's Aggressive Advocacy of Malaria Drug for Treating Coronavirus Divides Medical Community*, N.Y. TIMES, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-trump-malaria-drug.html>.

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 See *supra* note 7.

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>

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

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.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

[sell-nuclear-technology-to-saudi-arabia](https://www.americanoversight.org/sessions-letter); *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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>.

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 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,

A handwritten signature in blue ink that reads "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