



July 2, 2020

VIA EMAIL/ ONLINE PORTAL

Gorka Garcia-Malene
NIH FOIA Office
Building 31 Room 5B35
31 Center Drive, MSC 2107
Bethesda, MD 20892
<https://foiaportal.nih.gov/>

Robert Schofield
National Institute of Allergy and Infectious Diseases
Room 6G51
5601 Fishers Lane
Rockville, MD 20857
foia@niaid.nih.gov

Brandon Gaylord
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building
Room 729H
200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.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 your agency, 45 C.F.R. Part 5, American Oversight makes the following request for records.

In late April, the National Institute of Health (NIH) cancelled a grant previously awarded to EcoHealth Alliance, purportedly on the grounds that “NIH does not believe the current project outcomes align with the program goals and agency priorities.”¹ This action, apparently at the direction of the White House, came after news reports suggested that

¹ Sarah Oweremohle, *Trump Cuts U.S. Research on Bat-Human Virus Transmission over China Ties*, Politico (Apr. 27, 2020, 7:02 PM), <https://www.politico.com/news/2020/04/27/trump-cuts-research-bat-human-virus-china-213076>.



the group was funding the Wuhan Institute of Virology.² Prior to the funding cancellation, however, the president of EcoHealth Alliance had confirmed to NIH that none of its current funding had been sent to the Institute, that it had not entered into a contract with the Institute, and that it would comply with any federal requirements.³ The EcoHealth Alliance's focus—studying coronaviruses in bats—is also consistent with the NIH's strategic plan for studying novel coronaviruses.⁴ Leading scientists and scientific societies have since asked for NIH to review its decision to cut funding, expressing concern about the politicization of science.⁵

American Oversight seeks records that may shed light on the cancellation of the EcoHealth Alliance's grant.

Requested Records

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

Any final assessments or analyses (including formal memoranda, final talking points and associated background materials, or other written products) regarding the implications of terminating the EcoHealth Alliance project *Understanding the Risk of Bat Coronavirus Emergence*, funded under grant R01 AI110964, including but not limited to implications on research into the natural history of the novel coronavirus SARS-CoV-2 and the development of vaccines and treatments for the virus and the disease it causes, COVID-19.

American Oversight believes that your agencies are best positioned to determine where responsive records may reside. However, at a minimum, we believe a search for responsive records should include the following:

² David Lim & Brianna Ehley, *Fauci Says White House Told NIH to Cancel Funding for Bat Virus Study*, Politico (July 23, 2020, 5:41 PM),

<https://www.politico.com/news/2020/06/23/fauci-nih-white-house-bat-study-336452>.

³ *Partial Transcript of Email Exchanges in Which NIH Cuts off Grant Funding to EcoHealth Alliance*, Science,

<https://www.sciencemag.org/sites/default/files/Lauer.Daszak.NIH%20grant%20killed.partial%20email%20transcripts.April%202020.pdf>.

⁴ Owermhle, *supra* note 1; see Media Advisory, NIH, NIAID Strategic Plan Details COVID-19 Research Priorities, Apr. 23, 2020, <https://www.nih.gov/news-events/news-releases/niaid-strategic-plan-details-covid-19-research-priorities>.

⁵ *Nobel Laureates and Science Groups Demand NIH Review Decision to Kill Coronavirus Grant*, Science (May 21, 2020, 6:40 PM),

<https://www.sciencemag.org/news/2020/05/preposterous-77-nobel-laureates-blast-nih-decision-cancel-coronavirus-grant-demand>.

- Within HHS, the immediate offices of the Secretary and the Assistant Secretary for Preparedness and Response, and the headquarters staff of the Office of Intergovernmental and External Affairs (IEA).
- Within NIH, the immediate office of the Director, and the Office of Extramural Research (including but not limited to the files of Deputy Director Michael Lauer).
- Within the National Institute of Allergy and Infectious Diseases (NIAID), the immediate office of the Director, and the Division of Extramural Activities.

Please provide all responsive records from April 10, 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."⁶ The public has a significant interest in the federal government's support of research that could help combat the current coronavirus outbreak and prevent similar outbreaks in the future.⁷ 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 research funding has become politicized.⁸ 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.⁹ 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

⁶ 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ See Media Advisory, *supra* note 4.

⁸ See Science, *supra* note 5.

⁹ See 5 U.S.C. § 552(a)(4)(A)(iii).

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.¹⁰

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.¹¹ 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;¹² 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;¹³ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁴ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁵ 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

¹⁰ American Oversight currently has approximately 15,600 page likes on Facebook and 104,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 25, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 25, 2020).

¹¹ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹² 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>.

¹³ 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>.

¹⁴ *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>.

¹⁵ *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.¹⁶

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.
- 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.¹⁷ 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.¹⁸
- 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,¹⁹ and many agencies

¹⁶ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁷ *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).

¹⁸ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁹ 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 Christine H. Monahan at foia@americanoversight.org

Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight