



July 27, 2020

**VIA ONLINE PORTAL**

Office of FOIA Services  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549  
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.

On June 20, 2020, President Trump officially removed Geoffrey Berman from his position as U.S. Attorney for the Southern District of New York (SDNY).<sup>1</sup> This came after Attorney General William Barr announced Mr. Berman's resignation and Mr. Berman's subsequent statement that he had not agreed to resign from his post.<sup>2</sup> Mr. Berman's office has been involved in investigating a number of the President's close associates, including Michael Cohen and Rudolph Giuliani<sup>3</sup>—raising questions about the motivation for the removal.<sup>4</sup> Press reports that Jay Clayton, currently the Chairman of the Securities and Exchange Commission, is slated to fill the vacancy.<sup>5</sup>

American Oversight seeks records with the potential to shed light on Geoffrey Berman's removal and Jay Clayton's selection for the role of U.S. Attorney.

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<sup>1</sup> Alan Feuer, et al., *Trump Fires Attorney in New York Who Investigated His Inner Circle*, N.Y. Times, June 20, 2020, <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Quinta Jurecic & Benjamin Wittes, *Three Plausible—And Troubling—Reasons Why Barr Tried to Force Berman Out*, The Atlantic, June 22, 2020, <https://www.theatlantic.com/ideas/archive/2020/06/question-berman-saga-why/613345/>.

<sup>5</sup> Matthew Goldstein & Ben Protess, *Jay Clayton, Low-Profile Regulator, Is Catapulted Into a Political Fight*, N.Y. Times, Jun. 20, 2020, <https://www.nytimes.com/2020/06/20/business/jay-clayton-sdny-sec.html>.



## Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that your agency produce the following records as soon as practicable, and at least within twenty business days:

All electronic communications (including email messages, complete email chains, email attachments, calendar invitations, and text messages) between (a) Chairman Jay Clayton and (b) Attorney General William Barr or his Chief of Staff William Levi.

Please provide all responsive records from May 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.

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>6</sup> The public has a significant interest in the reasons behind Mr. Berman's firing and proposed replacement with Mr. Clayton. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including potential politicization of the Department of Justice and U.S. Attorneys' Offices under President Trump.<sup>7</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>8</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. 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

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<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>7</sup> See Jurecic & Wittes, *supra* note 4.

<sup>8</sup> 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.<sup>9</sup>

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website.<sup>10</sup> Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to the Trump Administration’s contacts with Ukraine and analyses of those contacts;<sup>11</sup> posting records and editorial content about the federal government’s response to the Coronavirus pandemic;<sup>12</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>13</sup> 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>14</sup> and posting records and

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<sup>9</sup> American Oversight currently has approximately 15,600 page likes on Facebook and 104,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Jul. 22, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Jul. 22, 2020).

<sup>10</sup> See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

<sup>11</sup> *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

<sup>12</sup> See generally *The Trump Administration’s Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; see, e.g., *‘We’ve All Given Up Getting a Straight Answer From You Guys: Frustrated Emails Between Illinois Governor’s Office and White House*, <https://www.americanoversight.org/weve-all-given-up-getting-a-straight-answer-from-you-guys-frustrated-emails-between-illinois-governors-office-and-white-house>.

<sup>13</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>14</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>.

analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.<sup>15</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 17 C.F.R. § 200.80(d), 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. There is significant public interest in Mr. Berman's removal from his position. The lack of clarity on why he was fired, in addition to the events leading up to the firing itself, have prompted concern regarding the Trump administration's motivations for firing Mr. Berman.<sup>16</sup> There has also been a public outcry against the move. The Hill reported that, "[m]ore than 100 former Manhattan prosecutors condemned" Mr. Berman's removal in an open letter.<sup>17</sup>

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 the reasons behind Mr. Berman's firing. Attorney General Barr has announced that the Trump Administration plans to nominate current Securities and Exchange Commission Chairman Jay Clayton to the position of U.S. Attorney for SDNY.<sup>18</sup> Mr. Clayton has also refused to give an answer on "whether he would recuse himself from pending investigations involving Trump's interests and associates if confirmed for the post."<sup>19</sup> The public must know if the Trump administration intends to install Mr. Clayton in the position for the political or personal benefit of the president before Mr. Clayton is potentially confirmed.

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<sup>15</sup> See generally *Swamp Airlines: Chartered Jets at Taxpayer Expense*, American Oversight, <https://www.americanoversight.org/investigation/swamp-airlines-private-jets-taxpayer-expense>; see e.g. *New Information on Pompeo's 2017 Trips to His Home State*, American Oversight, <https://www.americanoversight.org/new-information-on-pompeos-2017-trips-to-his-home-state>.

<sup>16</sup> See Jurecic & Wittes, *supra* note 4.

<sup>17</sup> Justine Coleman, *More Than 100 Former Manhattan Prosecutors Condemn Berman Firing*, The Hill (June 6, 2020, 2:21 PM) <https://thehill.com/homenews/administration/503802-more-than-100-former-manhattan-prosecutors-condemn-berman-firing>.

<sup>18</sup> Shayna Jacobs, *Trump's Pick for Manhattan U.S. Attorney Refuses to Say He Would Recuse From Probes of President's Associates*, Wash. Post (June 25, 2020, 7:06 PM), [https://www.washingtonpost.com/national-security/jay-clayton-us-attorney-geoffrey-berman/2020/06/25/1063c1fa-b6ff-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/national-security/jay-clayton-us-attorney-geoffrey-berman/2020/06/25/1063c1fa-b6ff-11ea-aca5-ebb63d27e1ff_story.html).

<sup>19</sup> *Id.*

I also certify to be true and correct to the best of my knowledge and belief that there is widespread and exceptional media interest and there exist possible questions concerning the government's integrity, which affect public confidence. There is widespread and exceptional media interest in Mr. Berman's firing. The media has devoted significant attention to this issue, across a variety of major news outlets.<sup>20</sup>

Moreover, I certify to be true and correct to the best of my knowledge and belief that there exist possible questions concerning the government's integrity regarding Mr. Berman's firing and the potential politicization of DOJ investigations. Time Magazine reported that Mr. Berman's removal, "has raised acute concerns given both the nature of Berman's work at SDNY and Trump's own history of statements and actions eroding the independence of the DOJ — or at the very least, the appearance of it."<sup>21</sup> Consequently, records that shed light on why the Trump Administration fired Mr. Berman would help clarify these issues.

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,<sup>22</sup> 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."<sup>23</sup> 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.<sup>24</sup> As discussed previously, American

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<sup>20</sup> See *id.*; see also, e.g., Barbara Campbell et al., *President Trump Fires Top U.S. Prosecutor Who Investigated His Allies, Barr Says*, NPR (June 20, 2020, 12:30 AM), <https://www.npr.org/2020/06/20/881148365/geoffrey-berman-u-s-attorney-who-prosecuted-trump-allies-says-he-wont-quit>; Katherine Faulders et al., *Berman Relents, Leaves Post as US Attorney After Taking Stand Against Firing*, ABC News (June 20, 2020, 7:04 PM), <https://abcnews.go.com/Politics/im-involved-trump-claims-barr-president-removed-us/story?id=71357518>; Martin Pengelly & Richard Luscombe, *Geoffrey Berman, US Attorney Behind Inquiries into Trump Allies, Resigns After Barr Announces Firing*, The Guardian (June 20, 2020, 7:02 PM), <https://www.theguardian.com/us-news/2020/jun/20/geoffrey-berman-donald-trump-william-barr-fires>.

<sup>21</sup> Tessa Berenson, *Geoffrey Berman's Investigations into Trump Associates Raise Concerns over His Firing*, Time (June 22, 2020, 3:47 PM), <https://time.com/5857204/berman-trump-firing-questions/>.

<sup>22</sup> 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).

<sup>23</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>24</sup> See *supra* note 9.

Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>25</sup>

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:

- 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

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<sup>25</sup> 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-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, American Oversight, <https://www.americanoversight.org/sessions-letter>.



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.<sup>26</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>27</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>28</sup> 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.

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<sup>26</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>27</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>28</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 Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

- 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 Hart Wood at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.873.1743. Also, if American Oversight's request for expedition is not granted or its request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers  
Executive Director  
American Oversight