



August 7, 2020

VIA ONLINE PORTAL/EMAIL

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
441 G St NW, 6th Floor
Washington, DC 20530
Via FOIA STAR

Amanda M. Jones
Chief, FOIA/PA Unit
Criminal Division
Department of Justice
Keeney Building, Suite 1127
Washington, DC 20530-0001
crm.foia@usdoj.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 the U.S. Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

On March 25, 2020, ProPublica reported that federal prosecutors in Eastern District of Texas, led by then-U.S. Attorney Joseph Brown, sought to prosecute Walmart over alleged opioid dispensing practices, but top DOJ officials prevented the criminal charges from moving forward and stymied the civil investigation.¹ Brown then resigned on May 26, 2020, reportedly ousted over his statements in the ProPublica story defending the investigations, and was replaced by Stephen Cox.²

¹ Jesse Eisinger & James Bandler, *Walmart Was Almost Charged Criminally Over Opioids. Trump Appointees Killed the Indictment*, ProPublica (March 25, 2020, 5:00 AM), <https://www.propublica.org/article/walmart-was-almost-charged-criminally-over-opioids-trump-appointees-killed-the-indictment>.

² Kara Scannell, et al., *In Texas, Questions Grow About a Lesser-Known US Attorney Ousted by Attorney General Barr*, CNN (June 26, 2020, 11:40 AM), <https://www.cnn.com/2020/06/26/politics/barr-texas-questionable-ouster/index.html>.



Brown's resignation, and the events preceding it, have raised concerns over political interference within the DOJ.³

American Oversight seeks records with potential to shed light on the Department's actions.

Requested Records

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

1. Any final directives, guidance, memoranda, or analyses regarding the criminal prosecution or investigation against Walmart Inc. in connection with possible violations of the Controlled Substances Act or False Claims Act in the Eastern District of Texas.

The search for responsive records should include all individuals and locations where records are likely to exist, including but not limited to:

Office of Information Policy:

- i. Office of the Attorney General
- ii. Office of the Deputy Attorney General
- iii. Office of the Associate Attorney General

Criminal Division:

- i. Office of the Assistant Attorney General
- ii. Office of the Principal Deputy Assistant Attorney General
- iii. Narcotic and Dangerous Drug Section

Please provide all responsive records from August 1, 2018 through September 30, 2018.

2. Any final directives, guidance, memoranda, or analyses regarding the criminal prosecution or investigation against Walmart Inc. or employees of Walmart Inc. in connection with possible violations of the Controlled Substances Act or False Claims Act in the Eastern District of Texas.

The search for responsive records should include all individuals and locations where records are likely to exist, including but not limited to:

Office of Information Policy:

- i. Office of the Attorney General
- ii. Office of the Deputy Attorney General
- iii. Office of the Associate Attorney General

Criminal Division:

³ See *id.*

- i. Office of the Assistant Attorney General
- ii. Office of the Principal Deputy Assistant Attorney General
- iii. Narcotic and Dangerous Drug Section

Please provide all responsive records from September 1, 2019, through November 30, 2019.

3. All email communications (including email messages, complete email chains, email attachments, calendar invitations, and calendar attachments) sent by the officials specified below regarding any order or directive to decline to proceed with a criminal prosecution or investigation against Walmart Inc. or employees of Walmart Inc. in connection with possible violations of the Controlled Substances Act or False Claims Act in the Eastern District of Texas.

Specified Officials:

- i. Jeffrey Rosen, Deputy Attorney General
- ii. Rod Rosenstein, former Deputy Attorney General
- iii. Mary Daly, former Director of Opioid Enforcement and Prevention Efforts
- iv. Stephen Cox, former Deputy Associate Attorney General
- v. Brian Benczkowski, former Assistant Attorney General for the Criminal Division

In an effort to accommodate DOJ and reduce the number of potentially responsive records, American Oversight agrees that the search for responsive email communications may be limited to emails sent by the specified officials. Despite this search accommodation, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. For example, if a specified official received an email from a .com email address and responded to it, both the original email and her response should be included.

Please provide all responsive records from August 1, 2018, through November 30, 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."⁴ The public has a significant interest in understanding

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

the DOJ's declination to prosecute and investigate a major distributor of opioids over alleged unlawful activity.⁵ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the potential politicization of the DOJ and U.S. Attorneys' Offices. 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.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 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

⁵ See Eisinger & Bandler, *supra* note 1.

⁶ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ American Oversight currently has approximately 15,500 page likes on Facebook and 104,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited July 27, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 27, 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>.

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>.

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.

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.
- 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.¹⁴ It is not adequate to rely

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 *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).

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.¹⁵

- 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,¹⁶ 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 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.

¹⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁶ 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>.

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 Mehreen Rasheed at foia@americanoversight.org or (202) 848-1320. 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