



September 21, 2020

VIA EMAIL

Brandon Gaylord
US. Department of Health and Human Services
Freedom of Information Officer
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.gov

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, 45 C.F.R. Part 5, American Oversight makes the following request for records.

Soon after the death of Supreme Court Justice Ruth Bader Ginsburg, President Trump signaled his intention to name a new nominee to the high court, saying that he intends the nomination and vetting process to “move very quickly.”¹ Numerous news reports have indicated that Seventh Circuit Court of Appeals Judge Amy Coney Barrett, Eleventh Circuit Court of Appeals Judge Barbara Lagoa, Fourth Circuit Court of Appeals Judge Allison Jones Rushing, Eleventh Circuit Court of Appeals Judge Britt Grant, Sixth Circuit Court of Appeals Judge Joan Larsen, and Deputy Assistant and Deputy Counsel to the President Kate Todd are among the most likely potential nominees.²

¹ Veronica Stracqualursi & Jim Acosta, *Trump on Supreme Court Nominee ‘It Will Be a Woman’*, CNN (Sept. 19, 2020, 8:31 PM), <https://www.cnn.com/2020/09/19/politics/trump-ruth-bader-ginsburg-vacant-seat-fill/index.html>.

² *Id.*; Geoff Bennett et al., *Trump Vows to Choose a Woman to Fill Ginsburg’s Supreme Court Seat*, NBC News (Sept. 19, 2020, 8:05 PM), <https://www.nbcnews.com/politics/supreme-court/amy-coney-barrett-emerging-front-runner-fill-ginsburg-s-supreme-n1240547>; Peter Baker & Maggie Haberman, *Trump Presses for New Justice ‘Without Delay’ as Election-Season Battle Looms*, N.Y. Times, Sept. 19, 2020, <https://www.nytimes.com/2020/09/19/us/politics/supreme-court-trump.html>; Josh Wingrove et al., *Barrett Has Supreme Court Edge as List Widens to Lagoa, Thapar*, Bloomberg (Sept. 19, 2020, 2:18 PM), <https://www.bloomberg.com/news/articles/2020-09-19/amy-coney-barrett-emerges-as-frontrunner-for-trump-court-pick>; Carrie Johnson & Tamara Keith, *Sources: Trump Considers Barrett, Lagoa, Rushing for Supreme Court Spot*, NPR (Sept. 19, 2020, 3:26 PM), <https://www.npr.org/sections/death-of-ruth-bader->



Given the enormous national importance of and public interest in the background of the next nominee to the Supreme Court, American Oversight seeks records shedding light on whether and to what extent the Department of Health and Human Services' Office of Civil Rights was involved in discussions of potential Supreme Court nominees.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that the U.S. Department of Health and Human Services (“HHS”) produce the following records as soon as practicable, and at least within twenty business days:

1. All communications (including emails, complete email chains, calendar invitations, hard copy correspondence sent through any medium including courier services, text messages, and any attachments thereto) between (a) Director of the Office of Civil Rights Roger Severino and (b) any of the individuals or entities listed below, including but not limited to at the email addresses provided:
 - i. Judge Amy Coney Barrett
 - ii. Judge Barbara Lagoa
 - iii. Deputy Assistant and Counsel to the President Kate Comerford Todd
 - iv. Judge Britt Grant
 - v. Judge Allison Jones Rushing
 - vi. Judge Joan Larsen
 - vii. Judicial Crisis Network (any email address ending in judicialnetwork.com)
 - viii. Judicial Education Project
 - ix. Leonard Leo (ll@leonardleo.com, leonard.anthony.leo@gmail.com, lleo@fed-soc.org, leonard.leo@mindspring.com, and leonard.leo@hotmail.com)
 - x. Gary Marx (gary@madisonstrategiesllc.com)
 - xi. Jonathan Bunch (jonathan.bunch@fed-soc.org)
 - xii. Federalist Society (any email address ending in fed-soc.org)
 - xiii. Council for National Policy
 - xiv. CRC Advisors (any email address ending in crcadvisors.com or crcpublicrelations.com)

2. All email communications (including emails, complete email chains, calendar invitations, and attachments thereto) sent by Director of the Office of Civil Rights Roger Severino containing any of the following terms:
 - i. “Amy Coney”
 - ii. “Amy Barrett”
 - iii. “Amy C. Barrett”

[ginsburg/2020/09/19/914829456/sources-trump-considers-coney-barrett-lagoa-thapar-for-supreme-court-spot](https://www.americanoversight.org/document/ginsburg/2020/09/19/914829456/sources-trump-considers-coney-barrett-lagoa-thapar-for-supreme-court-spot).

- iv. “Justice Barrett”
- v. “Judge Barrett”
- vi. Lagoa
- vii. “Kate Todd”
- viii. “Kate Comerford Todd”
- ix. “Britt Grant”
- x. “Judge Grant”
- xi. “Allison Rushing”
- xii. “Jones Rushing”
- xiii. “Judge Rushing”
- xiv. “Joan Larsen”
- xv. “Judge Larsen”
- xvi. JCN
- xvii. “Judicial Crisis”
- xviii. “Leonard Leo”

For item 2 of this request, in an effort to accommodate HHS and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by Director Severino. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. This means, for example, that both Director Severino’s response to an email and the initial received message are responsive to this request if either message contains one of the key terms listed above and the complete chain should be produced.

For both items of this request, please provide all responsive records from the following time periods:

- January 20, 2017, through December 31, 2017;
- June 27, 2018, through October 13, 2018;
- September 18, 2020, through the date of 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.”³ The public has a significant interest in the background of leading candidates to fill Justice Ruth Bader

³ 5 U.S.C. § 552(a)(4)(A)(iii).

Ginsburg’s seat on the Supreme Court.⁴ Records with the potential to shed light on the potential nominee’s prior interactions with agency officials and how those officials may have affected the potential nominees’ careers would contribute significantly to public understanding of the background of individuals who may be nominated to one of the most influential positions in our government. 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.⁵ 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.⁶

⁴ See, e.g., Nicole Lynn Pesce, *5 Things to Know About Trump’s Possible Supreme Court Picks — Like How Barbara Lagoa Could Help Him in Florida*, MarketWatch (Sept. 21, 2020, 1:49 PM), <https://www.marketwatch.com/story/5-things-to-know-about-trumps-possible-supreme-court-picks-like-how-barbara-lagoa-could-help-him-in-florida-2020-09-21>; Evan Semones, *What You Need to Know About Amy Coney Barrett*, Politico (Sept. 19, 2020, 6:15 PM), <https://www.politico.com/news/2020/09/19/amy-coney-barrett-what-you-need-to-know-418378>; Colby Itkowitz, *Who Is Amy Coney Barrett, the Judge at the Top of Trump’s List to Replace Ruth Bader Ginsburg?*, Wash. Post (Sept. 19, 2020 5:35 PM), <https://www.washingtonpost.com/politics/2020/09/19/who-is-amy-coney-barrett/>; Evie Fordham, *Who Is Judge Amy Coney Barrett, Potential SCOTUS Contender?*, Fox News, Sept. 19, 2020, <https://www.foxnews.com/politics/amy-coney-barrett-ruth-bader-ginsburg-supreme-court>; Andrew Solender, *What To Know About Barbara Lagoa, Potential Supreme Court Pick Whose Stock Is Rising*, Forbes (Sept. 21, 2020, 12:50 PM), <https://www.forbes.com/sites/andrewsolender/2020/09/21/what-to-know-about-barbara-lagoa-potential-supreme-court-pick-whose-stock-is-rising/#1db0153e5356>; Evan Semones, *What You Need to Know About Barbara Lagoa*, Politico (Sept. 19, 2020, 6:15 PM), <https://www.politico.com/news/2020/09/19/what-you-need-to-know-about-barbara-lagoa-418437>; Tyler Olson, *Who Is Allison Jones Rushing, Possible Trump Supreme Court Contender?*, Fox News, Sept. 21, 2020, <https://www.foxnews.com/politics/who-is-allison-jones-rushing-possible-trump-supreme-court-contender>.

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii)

⁶ American Oversight currently has approximately 15,600 page likes on Facebook and 105,400 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 20, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 20, 2020).

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.⁷ 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;⁸ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;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 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;¹¹ and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹²

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 45 C.F.R. § 5.27, American Oversight requests that your agency expedite the processing of this request.

⁷ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁸ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁹ 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., *CDC Calendars from 2018 and 2019: Pandemic-Related Briefings and Meetings*, American Oversight, <https://www.americanoversight.org/cdc-calendars-from-2018-and-2019-pandemic-related-briefings-and-meetings>.

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 *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>.

¹² 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>.

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. Immediately following the death of Justice Ruth Bader Ginsburg, President Trump signaled that he intends to “move very quickly” in naming a new nominee to the Supreme Court.¹³ In addition, the morning after Justice Ginsburg’s death was announced, the president also tweeted to the Republican National Committee that they have an “obligation, without delay,” “to make decisions for the people who so proudly elected us, the most important of which has long been considered to be the selection of the United States Supreme Court Justices.”¹⁴ Senate Majority Leader Mitch McConnell has also stated that whomever President Trump nominates “will receive a vote on the floor of the United States Senate.”¹⁵ Indeed, it is possible President Trump’s pick could receive a vote before the November election, less than 1.5 months away.¹⁶

There is an urgent need to inform the public about whomever President Trump may pick to fill the open Supreme Court seat. There is currently widespread media speculation regarding who the nominee may be, with numerous news articles pointing to the subjects of this request as leading contenders.¹⁷ Accordingly, within a matter of hours, news reports began discussing the backgrounds and legal records of these candidates.¹⁸ Records responsive to this request will shed additional light on this topic, which is urgently needed in order to inform the public concerning the final nominee in advance of a confirmation hearing that could take place imminently. Indeed, if a request for records intended to inform the public regarding a potential lifetime appointment to the Supreme Court fails to qualify for expedited processing, it is difficult to imagine what would.

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,¹⁹ 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

¹³ Stracqualursi & Acosta, *supra* note 1.

¹⁴ Donald J. Trump (@realDonaldTrump), Twitter (Sept. 19, 2020, 10:10 AM), <https://twitter.com/realDonaldTrump/status/1307321159113936896>.

¹⁵ Brooke Singman, *McConnell: Trump’s Supreme Court Nominee ‘Will Receive a Vote on the Floor of the United States Senate*, Fox News (Sept. 19, 2020), <https://www.foxnews.com/politics/mcconnell-supreme-court-nominee-vote-floor>.

¹⁶ Emily Cochran, *How Mitch McConnell Can Quickly Push Through Trump’s Supreme Court Nominee*, N.Y. Times (Sept. 20, 2020, 1:39 AM), <https://www.nytimes.com/2020/09/19/us/politics/mitch-mcconnell-trump-supreme-court.html>.

¹⁷ *See supra* note 2.

¹⁸ *See supra* note 4.

¹⁹ *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).

audience.”²⁰ 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.²¹ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²²

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, because 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.
- 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

²⁰ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²¹ *See supra* note 6.

²² *See generally* *News*, American Oversight, <https://www.americanoversight.org/blog>; *see, e.g.,* *Emails and Resume of Trump’s Pick to Head Government Personnel Office*, American Oversight, <https://www.americanoversight.org/emails-and-resume-of-trumps-pick-to-head-government-personnel-office>; *CDC Calendars from 2018 and 2019: Pandemic-Related Briefings and Meetings*, American Oversight, <https://www.americanoversight.org/cdc-calendars-from-2018-and-2019-pandemic-related-briefings-and-meetings>; *State Department Releases Ukraine Documents to American Oversight*, American Oversight, <https://www.americanoversight.org/state-department-releases-ukraine-documents-to-american-oversight>; *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>.

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.²³ 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.²⁴
- 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,²⁵ 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

²³ 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).

²⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁵ 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>.

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 line extending to the left.

Austin R. Evers
Executive Director
American Oversight