



September 30, 2020

**VIA Online Portal and Email**

Kevin Krebs  
Assistant Director  
FOIA/Privacy Unit  
Executive Office for United States Attorneys  
Department of Justice  
175 N Street, N.E., Suite 5.400  
Washington, DC 20530-0001  
Via Online Portal

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

Amanda M. Jones  
Chief, FOIA/PA Unit  
Criminal Division  
Department of Justice  
Suite 1127, Keeney Building  
Washington, DC 20530-0001  
[crm.foia@usdoj.gov](mailto:crm.foia@usdoj.gov)

Kilian B. Kagle, Chief  
Civil Rights Division  
4CON, Room 6.153  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530  
[CRT.FOIArequests@usdoj.gov](mailto:CRT.FOIArequests@usdoj.gov)

**Re: Freedom of Information Act Request**

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.



On September 24, the U.S. Attorney’s Office in the Middle District of Pennsylvania announced that it had opened an inquiry into nine ballots, purportedly all votes for candidate Donald Trump, that were found “discarded.”<sup>1</sup> That statement was revised to clarify that seven of the ballots were cast for candidate Trump, while two were resealed and their contents are unknown.<sup>2</sup> Reportedly, Attorney General Barr personally briefed President Trump about the investigation before the information was made public.<sup>3</sup> Before the press release was made public, Press Secretary Kayleigh McEnany previewed in her press briefing that more information about the investigation would be forthcoming.<sup>4</sup> Former DOJ officials and election experts have called this press release “illegitimate”, “improper”<sup>5</sup>, and “contrived to provide political ballast for a sitting President’s campaign narrative.”<sup>6</sup>

American Oversight seeks records with the potential to shed light on the DOJ actions and decision-making regarding this press release and the related disclosures regarding an ongoing investigation.

### **Requested Records**

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

All email communications (including emails, email attachments, complete email chains, and calendar invitations) sent by any of the DOJ officials specified below containing any of the following terms:

#### Specified DOJ Officials

1. William Barr, Attorney General
2. Will Levi, Chief of Staff
3. Jeffrey Rosen, Deputy Attorney General

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<sup>1</sup> Zach Montellaro, *DOJ Announcement on Pennsylvania Ballot Investigation Baffles Election Experts*, Politico (Sept. 24, 2020, 10:41 PM), <https://www.politico.com/news/2020/09/24/doj-announcement-on-pennsylvania-ballot-investigation-baffles-election-experts-421541>.

<sup>2</sup> Press Release, *Revised Statement of U.S. Attorney Freed on Inquiry into Reports of Potential Issues with Mail-In Ballots*, U.S. Att’y Office for the Middle Dist. Of Pa., Sept. 24, 2020, <https://www.justice.gov/usao-mdpa/pr/revised-statement-us-attorney-freed-inquiry-reports-potential-issues-mail-ballots>.

<sup>3</sup> Alexander Mallin, “Barr Briefed Trump on Investigation into Discarded Pennsylvania Ballots”, ABC News (Sept. 25, 2020, 1:17 PM), <https://abcnews.go.com/Politics/barr-briefed-trump-investigation-discarded-pennsylvania-ballots/story?id=73244344>.

<sup>4</sup> *Id.*

<sup>5</sup> Montellaro, *supra* note 1.

<sup>6</sup> David Laufman (@DavidLaufmanLaw), Twitter (Sept. 24, 2020, 2:45 PM), <https://twitter.com/DavidLaufmanLaw/status/1309202220060205056> (“This is both bizarre and disturbing — US Attorney’s Offices don’t issue reports on pending investigations— and certainly not reports so blatantly contrived to provide political ballast for a sitting President’s campaign narrative.”).

4. Anyone serving as White House Liaison
5. David Freed, US Attorney for the Middle District of Pennsylvania
6. Anyone serving in the role of Chief of Staff or a similar position to David Freed
7. John Gurganus, Chief, Criminal Division, Middle District of Pennsylvania
8. Dawn Clark, Public Affairs Officer, Middle District of Pennsylvania
9. Eric Dreiband, Assistant Attorney General of the Civil Rights Division
10. Brian Rabbitt, Assistant Attorney General of the Criminal Division

#### Key Terms

1. “Federal prosecution of election offenses”
2. “Election offenses”
3. “Election investigations”
4. “Applicable guidance”
5. “Election guidance”
6. “Advantages of federal prosecution”

In an effort to accommodate DOJ and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by the specified custodians. 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 a specified custodian’s response to an email from containing a specified term and the initial received message are responsive to this request and should be produced.

This request includes all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

Please provide all responsive records from September 21, 2020 through September 28, 2020.

#### **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>7</sup> The public has a

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

significant interest in the potential politicization of DOJ in the decisions to investigate mail-in ballots in Pennsylvania and to announce the investigation and its most sensitive details publicly.<sup>8</sup> Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the decision to investigate mail-in ballots in Pennsylvania and announce the investigation was politically motivated or coordinated with the White House. 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>9</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 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>10</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>11</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>12</sup> posting records and editorial content about the federal government's response to the Coronavirus pandemic;<sup>13</sup> posting records received as part of American Oversight's

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<sup>8</sup> Nick Corasaniti & Michael S. Schmidt, *Justice Dept. Discloses Pa. Ballot Inquiry, Prompting Fears of Politization*, N.Y. Times (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/politics/pennsylvania-mail-in-voter-fraud-investigation.html>.

<sup>9</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>10</sup> 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. 28, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 28, 2020).

<sup>11</sup> See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

<sup>12</sup> *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

<sup>13</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., *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>.

“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>14</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>15</sup> and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.<sup>16</sup>

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. 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>14</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>15</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>.

<sup>16</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>.

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>17</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>18</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>19</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.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the

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<sup>17</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>18</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>19</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>.

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 Emma Lewis at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 919-6303. 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,



Austin R. Evers  
Executive Director  
American Oversight