



October 15, 2020

VIA EMAIL

Open Records Officer
House Right-to-Know Office
133 Main Capitol Building
Harrisburg, PA 17120-2220
righttoknow@pabmc.net

Re: Right-to-Know Law Request

Dear Open Records Officer:

Pursuant to the Right-to-Know Law (RTKL), as codified at 65 P.S. §§ 67.101 et seq., American Oversight makes the following request for records.

The November 2020 election, conducted in the midst of a global pandemic, will present election administrators with unprecedented logistical difficulties, including the challenges associated with processing a record number of mail ballots.¹ Concerns have arisen that resulting delays in the certification of election results might cause state governments to appoint delegates to the Electoral College directly, potentially leading to scenarios in which a presidential candidate could gain a state's delegates without definitively winning a plurality of votes.² Recent reporting indicates that senior legislative officials, including Senate Majority Leader Jake Corman, have discussed the possibility of direct appointment of electors.³

American Oversight seeks records with the potential to shed light on conversations by elected officials concerning contingency plans in the event of a close or contested election, including regarding the direct appointment of electors.

Requested Records

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

¹ Erin Cox et al., *Postal Service Warns 46 States Their Voters Could Be Disenfranchised by Delayed Mail-In Ballots*, Wash. Post (Aug. 14, 2020, 4:44 PM),

https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html.

² Edward Isaac-Dovere, *The Deadline that Could Hand Trump the Election*, The Atlantic, Sept. 9, 2020, <https://www.theatlantic.com/politics/archive/2020/09/trump-biden-electoral-count-act-1887/615994/>.

³ Barton Gellman, *The Election That Could Break America*, The Atlantic, Sept. 23, 2020 <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/>.



All email communications (including emails, complete email chains, calendar invitations, and attachments thereto) sent by Majority Leader Benninghoff or his Chief of Staff Robert Nye, and containing any of the terms specified below:

Specified Terms:

- | | |
|--------------------------|----------------------|
| 1. "Bush v" | 17. "12th amendment" |
| 2. Chiafolo | 18. 12A |
| 3. "Contested election" | 19. "3 U.S.C." |
| 4. "Direct appointment" | 20. "3 USC" |
| 5. "Electoral College" | 21. "December 8" |
| 6. "Electoral Count Act" | 22. "Dec. 8" |
| 7. "Failed election" | 23. "Dec 8" |
| 8. Faithless | 24. "12/8" |
| 9. Gore | 25. "December 23" |
| 10. McPherson | 26. "Dec. 23" |
| 11. "Slate of" | 27. "Dec 23" |
| 12. "Safe harbor" | 28. "12/23" |
| 13. "Section 15" | 29. "January 6" |
| 14. "Title 3" | 30. "Jan. 6" |
| 15. Tribunal | 31. "Jan 6" |
| 16. "Twelfth Amendment" | 32. "1/6" |

Please provide all responsive records from August 1, 2020, through the date the search is conducted.

In an effort to accommodate your office and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by Majority Leader Benninghoff or Mr. Nye. 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 Majority Leader Benninghoff's response to an email containing one of the listed terms as well as the initial received message are responsive to this request and should be produced.

Fee Waiver Request

In accordance with 65 P.S. § 67.1307(f)(2), American Oversight requests a waiver of fees associated with processing this request for records, because disclosure of the requested information is "in the public interest."

The public has a significant interest in the administration of elections in Pennsylvania.⁴ Records with the potential to shed light on this matter would contribute significantly to

⁴ See, e.g., Max Greenwood, *Pennsylvania Risks Becoming Center of Election Chaos*, The Hill (Sept. 27, 2020, 6:10 AM), <https://thehill.com/homenews/campaign/518300->

public understanding of operations of the government, including what contingencies public officials have discussed in the event of a close or contested election.⁵

American Oversight is committed to transparency and makes the responses agencies provide to open records 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. 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

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 and analysis related to the organization's State Accountability Project covering voting rights issues in various states;⁸ posting records and analysis of federal and state governments' responses to the Coronavirus pandemic;⁹ posting records received as part of American

[pennsylvania-risks-becoming-center-of-election-chaos](https://www.americanoversight.org/blog/pennsylvania-risks-becoming-center-of-election-chaos); Jonathan Lemire et al., *Trump Shifts Focus to Pennsylvania to Shore Up Reelection*, Associated Press, Sept. 26, 2020, <https://apnews.com/article/election-2020-virus-outbreak-pennsylvania-elections-archive-5d4ec6296a36069838ec02b151ebe726>.

⁵ See *supra*, Gellman, note 1.

⁶ American Oversight currently has approximately 15,600 page likes on Facebook and 105,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Oct. 7, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Oct. 7, 2020).

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

⁸ See generally *State Accountability Project*, American Oversight, https://www.americanoversight.org/areas_of_investigation/state-local-investigations; see, e.g. *State Government Contacts with Voting-Restriction Activists*, American Oversight, <https://www.americanoversight.org/investigation/state-government-contacts-with-voting-restriction-activists>; *Georgia's Voting Machines and Election Security*, American Oversight, <https://www.americanoversight.org/investigation/georgias-voting-machines-and-election-security>.

⁹ See e.g. *The Trump Administration's Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; *Tulsa Health Officials Initially Estimated Trump Rally Would Directly Lead to 2 to 9 Deaths*, American Oversight, <https://www.americanoversight.org/tulsa-health-officials-initially-estimated-trump-rally-would-directly-lead-to-2-to-9-deaths>; *Wisconsin Documents Offer Window into Early Uncertainty over COVID-19*, American Oversight,

Oversight’s “Audit the Wall” project to gather and analyze information related to the Trump administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁰ and 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

Finally, this request is primarily and fundamentally for non-commercial purposes. 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.

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:

- 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

<https://www.americanoversight.org/wisconsin-documents-offer-window-into-early-uncertainty-over-covid-19>; *In the Documents: Florida Health Department Efforts to Suppress Release of Coronavirus Records*, American Oversight, <https://www.americanoversight.org/in-the-documents-florida-health-department-efforts-to-suppress-release-of-coronavirus-records>.

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>.

using unofficial systems or stored outside of official files are subject to the Right-to-Know Law.¹²

- 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 under 65 P.S. § 67.706. 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 records@americanoversight.org or (202) 919-6303. Also, if American Oversight's

¹² See, e.g., *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95–97 (Pa. Commw. Ct. 2012).

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 flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight