



November 9, 2020

VIA FOIA ONLINE

U.S. General Services Administration
FOIA Requester Service Center (H3A)
1800 F Street NW, 7308
Washington, DC 20405-0001
Via FOIAOnline

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 the U.S. General Services Administration (GSA), 41 C.F.R. Part 105-60, American Oversight makes the following request for records.

Reports indicate that GSA Administrator Emily Murphy has not, and does not plan to, issue an ascertainment that Joe Biden is the apparent winner of the presidential election.¹ Without this determination, President-elect Biden's transition will experience a delay in receiving resources and access to agencies necessary for a smooth and effective transition.² Given that all major news networks have projected that President-elect Biden has won the election, GSA's failure to act raises questions about whether political considerations are improperly influencing the agency's decision-making. American Oversight seeks records with the potential to shed light on this matter.

Requested Records

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

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

- i) Ascertainment
- ii) Ascertain

¹ Lisa Rein et al., *A Little Known Trump Appointee Is In Charge of Handling Transition Resources to Biden – And She Isn't Budgeting*, Wash. Post (Nov. 8, 2020, 8:09 PM), https://www.washingtonpost.com/politics/trump-gsa-letter-biden-transition/2020/11/08/07093acc-21e9-11eb-8672-c281c7a2c96e_story.html.

² *Id.*



- iii) Ascertained
- iv) “Presidential Transition Act”
- v) “3 U.S.C. 102”
- vi) “3 U.S.C. §102”
- vii) “3 U.S.C. § 102”
- viii) “apparent winner”
- ix) “President-elect”
- x) “December 14th”
- xi) “December 14”
- xii) “Dec. 14”
- xiii) “12/14”
- xiv) “projected winner”
- xv) “electoral college”
- xvi) POTUS
- xvii) VPOTUS
- xviii) “Trump campaign”
- xix) “Biden campaign”

Please provide all responsive records from October 7, 2020, through the date the search is conducted.

Specified Officials:

- i) Emily Murphy, Administrator
- ii) Allison Brigati, Deputy Administrator
- iii) Robert Borden, Chief of Staff
- iv) Trent Benishek, General Counsel
- v) Mary Gibert, Federal Transition Coordinator
- vi) Carla Sansalone, White House Liaison (or anyone else acting as White House Liaison)

In an effort to accommodate the agency 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 officials. 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 an official’s response to an email and the initial received message are responsive to this request and should be produced.

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 whether and to what extent the GSA is failing to take action to ensure a smooth presidential transition for inappropriate political reasons. Records with the potential to shed light on GSA’s communications with the White House and about the decision not to ascertain that President-elect Biden is the apparent winner of the presidential election will shed light on this matter. 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.⁴ 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.⁵

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.⁶ 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;⁷ 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

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ *See id.*

⁵ American Oversight currently has approximately 15,600 page likes on Facebook and 106,000 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight> (last visited Nov. 9, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Nov. 9, 2020).

⁶ *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁷ *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>.

those records reveal;⁸ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;⁹ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁰ 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.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), 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 an extremely limited period of time for President-elect Biden's team to gain the knowledge and resources necessary to effectuate a smooth transition of power across the federal government. There is an urgent need to obtain the requested records to shed light on whether and to what extent that time is being wasted for inappropriate political purposes despite clear projections that President-elect Biden is the apparent winner of the presidential election.

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 whether White House staffers or other administration officials have taken actions to prevent an effective transfer of power.

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

⁸ 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>.

⁹ *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>.

¹⁰ *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>.

¹¹ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, American Oversight, <https://www.americanoversight.org/sessions-letter>.

accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹² 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.”¹³ 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.¹⁴ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁵

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.

¹² 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).

¹³ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁴ American Oversight currently has approximately 15,600 page likes on Facebook and 106,000 followers on Twitter. American Oversight, Facebook,

<https://www.facebook.com/weareoversight>

(last visited Nov. 9, 2020); American Oversight (@weareoversight), Twitter,

<https://twitter.com/weareoversight> (last visited Nov. 9, 2020).

¹⁵ 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>.

- In conducting your search, please understand the terms “record” in its 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.¹⁶ 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.¹⁷
- 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,¹⁸ 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

¹⁶ 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).

¹⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁸ 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>.

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.

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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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