



May 26, 2021

VIA EMAIL

The Privacy Office
Privacy Office, Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, DC 20528-065
foia@hq.dhs.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 your agency, 6 C.F.R. Part 5, American Oversight makes the following request for records.

Requested Records

American Oversight requests that the U.S. Department of Homeland Security (DHS) produce the following records within twenty business days:

1. Any final legal analyses relating to the Migrant Protection Protocols (MPP)¹ prepared by or provided to DHS officials.
2. All communications, meeting notices, meeting agendas, informational materials, talking points, or other materials exchanged with the U.S. Embassy in Mexico City regarding the MPP.
3. All records reflecting any formal or informal policies, procedures, instructions, or guidance regarding lodgings or housing for asylum applicants directed back to Mexico pursuant to the MPP. Responsive records should include any documents provided either to DHS officials or directly to asylum applicants.
4. All records reflecting any formal or informal policies, procedures, instructions, or guidance regarding the provision of transportation for asylum applicants directed back to Mexico pursuant to the MPP, including but not limited to arrangements with the government of Mexico for any such transportation. Responsive records should include any documents provided either to DHS officials or directly to asylum applicants.

¹ See Dep't of Homeland Sec., *Migrant Protection Protocols*, Jan. 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.



5. Any final reports, briefs, or other final documents created by or provided to DHS leadership regarding any risk of homicides, kidnapping, or other safety concerns posed to asylum-seekers subject to the MPP.
6. All communications (including email messages, email attachments, text messages, or other communications) between any of the DHS officials listed below and the White House Office, including any individual with an email address ending in @who.eop.gov, regarding the MPP.
7. All email communications (including complete email chains, email attachments, calendar invitations, and attachments thereto) sent by any of the DHS officials or employees listed below containing any of the following terms:
 - i. MPP
 - ii. "Migrant Protection Protocols"
 - iii. "Migrant Protection Protocol"
 - iv. "remain in Mexico"
 - v. "RIM"
 - vi. PACR
 - vii. "Prompt Asylum Claim Review"
 - viii. "Asylum Cooperation Agreement"
 - ix. HARP
 - x. "Humanitarian Asylum Review Process"
 - xi. "soft sided"
 - xii. "safe third"
 - xiii. "safe 3rd"

DHS Officials or Employees::

- i. Peter Gaynor
- ii. Chad Wolf
- iii. Kevin McAleenan
- iv. Ken Cuccinelli
- v. Kirstjen Nielsen
- vi. Chad Mizelle
- vii. David Pekoske
- viii. Christina Bobb
- ix. John Mitnick
- x. Miles Taylor
- xi. Michael Dougherty
- xii. Dimple Shah
- xiii. Cameron Quinn
- xiv. Julie Kirchner
- xv. Anyone serving in the capacity of White House Liaison or Advisor

In an effort to accommodate DHS and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited Item 7 of its request to emails sent by the custodians listed above. 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 custodian's response to an email including one of the key terms listed above and the initial received message are responsive to this request and should be produced.

For each item of this request, please provide all responsive documents from January 26, 2019, through the date the search is conducted.

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 the operations or activities of the government."² Specifically, there has been great public interest in the federal government's treatment of asylum applicants at the southern border, and particularly in the effects of the MPP.³ Immigration advocates characterized the radical change in the processing of asylum claims under the Trump administration as a "due process disaster for asylum seekers," noting that asylum seekers waiting in Mexico "would encounter substantial barriers to accessing U.S. attorneys."⁴ The requested records have the potential to shed light on the impact of the policy. And, as discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

² 6 C.F.R. § 5.11(k)(1)(i); *see also* 6 C.F.R. § 5.11(k)(2)(i)-(iv).

³ *See, e.g.*, Julian Resendiz, 'Remain in Mexico' Ordeal Ends for 10,707 Asylum-Seekers, Border Report, May 17, 2021, <https://www.borderreport.com/hot-topics/immigration/remain-in-mexico-ordeal-ends-for-10707-asylum-seekers/>; Andrew deGrandpre *et al.*, *Trump Administration to Start Sending Asylum Seekers to Wait in Mexico*, Wash. Post, Jan. 24, 2019, https://www.washingtonpost.com/world/national-security/trump-administration-to-start-sending-asylum-seekers-back-to-mexico/2019/01/24/53961fb0-2022-11e9-8e21-59a09ff1e2a1_story.html; Richard Gonzales, *U.S. Is Rolling Out Its 'Remain in Mexico' Policy on Central American Asylum-Seekers*, NPR (Jan. 24, 2019 10:37 PM), <https://www.npr.org/2019/01/24/688470513/u-s-plans-to-enforce-remain-in-mexico-policy-on-central-american-asylum-seekers>.

⁴ Kate Smith, *As Soon as Friday, Asylum Seekers Will Be Forced to Wait in Tijuana for Their Day in Immigration Court*, CBS News (Jan. 24, 2019, 10:30 PM), <https://www.cbsnews.com/news/catch-and-return-immigration-officials-asylum-seekers-tijuana-to-wait-2019-01-24/>.

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

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

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ American Oversight currently has approximately 15,700 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited May 25, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited May 25, 2021).

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>.

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.

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 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

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>.

personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹³ 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.¹⁴

- 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,¹⁵ 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.

¹³ 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).

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

¹⁵ 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>.

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 Hart Wood at foia@americanoversight.org or (202) 873-1743. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

/s/ Hart Wood
Hart Wood
on behalf of
American Oversight