



July 19, 2021

VIA ONLINE PORTAL

FOIA Officer
Department of Health and Human Services
Hubert H. Humphrey Building
Room 729H
200 Independence Avenue SW
Washington, DC 20201
Via Online Portal

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, American Oversight makes the following request for records.

After the outbreak of the coronavirus, many states suffered from a shortage of medical supplies, such as masks and ventilators.¹ Numerous local officials alleged that the federal government had redirected, confiscated, or otherwise interfered with their orders.² In the crucial early months of the crisis, this exacerbated the confusion and chaos among policymakers.³

American Oversight seeks records with the potential to shed light on how medical supplies were managed, allocated, and distributed in the midst of a global pandemic.

Requested Records

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

¹ Dennis Wagner, *Overwhelmed Hospitals, Equipment Shortages: Coronavirus Pandemic Plays Out as State Planners Expected*, USA Today (Apr. 13, 2020: 1:27 PM), <https://www.usatoday.com/story/news/2020/04/13/coronavirus-preparation-states-foresaw-shortages-ppe-equipment-triage-states/2974897001/>.

² Joel Rose, *A 'War' For Medical Supplies: States Say FEMA Wins By Poaching Orders*, NPR (Apr. 15, 2020: 4:18 PM), <https://www.npr.org/2020/04/15/835308133/governors-say-fema-is-outbidding-redirecting-or-poaching-their-medical-supply-or>.

³ *Id.*



1. All decision memoranda or orders, including but not limited to orders (including formal orders or informal instructions provided via email or memoranda) under the Defense Production Act or any other legal authorities, about the rerouting, inspecting, taking priority over, commandeering, seizing, intercepting, diverting, cancelling, or in any other way taking control or possession of equipment, whether temporarily or permanently, (including but not limited to memos justifying or summarizing these actions), that was in or on the way to the following locations:
 - i. Somerset County, New Jersey (on or around April 3, 2020): order of N-95 masks, KN-95 masks, surgical masks⁴
 - ii. In route to Kentucky from Texas (between March 15 and April 11, 2020): four shipments of protective gear headed to Kentucky hospitals⁵
 - iii. Baystate Health, Springfield, Massachusetts (on or around April 17, 2020): order of three-ply face masks and N-95 respirators⁶
 - iv. Bellingham's St. Joseph hospital and other PeaceHealth medical facilities in Washington State, Oregon, and Alaska (on or before Apr. 7, 2020): order of test kit materials⁷
 - v. Texas Assn. of Community Health Centers (on or before April 7, 2020): order of masks⁸
 - vi. Colorado (ordered by the state of Colorado, under the authority of Governor Polis on or around Apr. 4, 2020):⁹ order of 500 ventilators

⁴ Bill Bowman, *Feds Take All Of County's 35,000 Mask Order Targeted For Health Care Workers*, Franklin Reporter & Advocate, Apr. 3, 2020, http://franklinreporter.com/feds-take-all-of-countys-35000-mask-order-targeted-for-health-care-workers/?fbclid=IwAR27on28jwsFzYXsXcA91W3LK_1cb1vUUFjn_XsDN78OL4NqXn_KAOshMls.

⁵ Annie Linskey, et al., *As Feds Play 'Backup,' States Take Unorthodox Steps to Compete in Cutthroat Global Market for Coronavirus Supplies*, Wash. Post (Apr. 11, 2020, 4:49 AM), https://www.washingtonpost.com/politics/as-feds-play-backup-states-take-unorthodox-steps-to-compete-in-cutthroat-global-market-for-coronavirus-supplies/2020/04/11/609b5d84-7a70-11ea-a130-df573469f094_story.html.

⁶ Andrew W. Artenstein, *In Pursuit of PPE*, New England J. of Med., Apr. 17, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMc2010025>.

⁷ David Rasbach, *Feds Seize Coronavirus Test Kit Materials Bound for Bellingham Hospital and Northwest*, Bellingham Herald (Apr. 10, 2020, 11:28 AM), <https://www.bellinghamherald.com/news/coronavirus/article241884351.html>.

⁸ Noam N. Levey, *Hospitals Say Feds are Seizing Masks and Other Coronavirus Supplies Without a Word*, L.A. Times (Apr. 7, 2020, 2:07 PM), <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>.

⁹ Marianne Goodland, *Gov. Jared Polis: FEMA Took Our Ventilators Out From Under Us*, CO. POLITICS, Apr. 4, 2020, https://www.coloradopolitics.com/coronavirus/gov-jared-polis-fema-took-our-ventilators-out-from-under-us/article_29f23eba-76a1-11ea-a065-f7f95e2756a1.html.

- vii. Kentucky Hospital Association (between March 15 and April 11, 2020): unspecified supplies¹⁰
- viii. In route to Delaware from New York's John F. Kennedy (JFK) Airport (between April 1, and Apr. 21, 2020): order of N95 respirators and masks by Indutex USA; at least one order (shipment number 8994645378) arrived at JFK on April 6, 2020, and a second order arrived on April 19, 2020¹¹

American Oversight believes your agency is in the best position to know the location of these records. At a minimum, a reasonable search would include the following offices:

- a. Immediate Office of the Assistant Secretary for Preparedness and Response
- b. Immediate Office of the Director of the Biomedical Advanced Research and Development Authority
- c. Leadership of the Supply Chain and Industrial Base Assurance Steering Committee

Please provide all responsive records from February 15, 2020, to May 15, 2020.

- 2. All email communications (emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) of specified agency officials regarding any of the following instances in which federal officials reportedly redirected supplies intended for coronavirus response:
 - i. Somerset County, New Jersey (on or around April 3, 2020): order of N-95 masks, KN-95 masks, surgical masks¹²
 - ii. In route to Kentucky from Texas (between March 15 and April 11, 2020): four shipments of protective gear headed to Kentucky hospitals¹³
 - iii. Baystate Health, Springfield, Massachusetts (on or around April 17, 2020): order of three-ply face masks and N-95 respirators¹⁴
 - iv. Bellingham's St. Joseph hospital and other PeaceHealth medical facilities in Washington State, Oregon, and Alaska (on or before April 7, 2020): order of test kit materials¹⁵

¹⁰ Linskey, *supra* note 5 (“[A] deposit had already been made for supplies from China when, Colvin wrote, ‘we were told that the order was canceled at the request of the US Government.’”).

¹¹ Karl Baker, *Delaware Medical Supplier Says FEMA Seized 400,000 N95 Masks; Now He's Out Millions of Dollars*, USA TODAY (Apr. 21, 2020, 3:05 PM), <https://www.usatoday.com/story/news/nation/2020/04/21/indutex-usa-says-fema-seized-n-95-respirators-national-stockpile/2996256001/>.

¹² Bowman, *supra* note 4.

¹³ Linskey, *supra* note 5.

¹⁴ Artenstein, *supra* note 6.

¹⁵ Rasbach, *supra* note 7.

- v. Texas Assn. of Community Health Centers (on or before April 7, 2020): order of masks¹⁶
- vi. Colorado (ordered by the state of Colorado, under the authority of Governor Polis) (on or around April 4, 2020):¹⁷ order of 500 ventilators
- vii. Kentucky Hospital Association (between March 15 and April 11, 2020): unspecified supplies¹⁸
- viii. In route to Delaware from New York's John F. Kennedy (JFK) Airport (between April 1, and April 21, 2020): order of N95 respirators and masks by Indutex USA; at least one order (shipment number 8994645378) arrived at JFK on April 6, 2020, and a second order arrived on April 19, 2020¹⁹

Specified Officials:

- a. Dr. Robert Kadlec, Assistant Secretary for Preparedness and Response
- b. Anyone serving as Director of the Biomedical Advanced Research and Development Authority, including Rick Bright and Gary Disbrow
- c. Anyone serving on the Supply Chain and Industrial Base Assurance Steering Committee

Please provide all responsive records from February 15, 2020, to May 15, 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."²⁰ The public has a significant interest in the federal government's response to the coronavirus pandemic, including the early national shortage of equipment urgently needed to respond to the

¹⁶ Levey, *supra* note 8.

¹⁷ Goodland, *supra* note 9.

¹⁸ Linskey, *supra* note 5 ("[A] deposit had already been made for supplies from China when, Colvin wrote, 'we were told that the order was canceled at the request of the US Government.'").

¹⁹ Baker, *supra* note 11.

²⁰ 5 U.S.C. § 552(a)(4)(A)(iii).

crisis.²¹ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including federal agencies' decision-making around how to manage the nation's supply chain.²² 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.²³ 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.²⁴

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.²⁵ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to

²¹ See, e.g., Martha Mendoza & Kimberly Kruesi, *Nurses Push Back on Pressure to Work Without Right Equipment*, WASH. POST (Apr. 16, 2020, 12:22 AM), https://www.washingtonpost.com/politics/nurses-suspended-for-refusing-covid-19-care-without-n95-mask/2020/04/16/dc0428ce-7f99-11ea-84c2-0792d8591911_story.html; Martin Kaste, *Ventilator Shortages Loom As States Ponder Rules For Rationing*, NPR (Apr. 3, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/04/03/826082727/ventilator-shortages-loom-as-states-ponder-rules-for-rationing>.

²² Toluse Olorunnipa, et al., *Governors Plead for Medical Equipment From Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020, 3:39 PM), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html; Anita Kumar & Gavin Bade, *States Still Baffled Over How to Get Coronavirus Supplies from Trump*, POLITICO (Apr. 13, 2020, 7:02 AM), <https://www.politico.com/states/florida/story/2020/04/13/states-still-baffled-over-how-to-get-coronavirus-supplies-from-trump-1275083>.

²³ See 5 U.S.C. § 552(a)(4)(A)(iii).

²⁴ American Oversight currently has approximately 15,650 page likes on Facebook and 106,600 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited July 16, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 16, 2021).

²⁵ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

the Trump Administration’s contacts with Ukraine and analyses of those contacts;²⁶ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;²⁷ 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;²⁸ 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;²⁹ and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.³⁰

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

²⁶ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

²⁷ 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>.

²⁸ 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>.

²⁹ *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>.

³⁰ 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>.

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 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.³¹ 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.³²
- 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,³³ 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

³¹ 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).

³² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

³³ 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>.

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.

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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. 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,

/s/ Katherine Anthony
Katherine Anthony
on behalf of
American Oversight