



August 5, 2021

VIA EMAIL AND ONLINE PORTAL

Privacy Office
Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, DC 20528
foia@hq.dhs.gov

FOIA Officer
Customs and Border Protection
90 K Street NE
FOIA Division
Washington, DC 20229
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

FOIA Officer
Centers for Disease Control and Prevention
1600 Clifton Road NE
Building 57, Room MS D-54
Atlanta, GA 30333
Via Online Portal

FOIA Officer
U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010
uscis.foia@uscis.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, American Oversight makes the following request for records.

In response to the outbreak of the novel coronavirus, former President Trump invoked a section of the Public Health Safety Act, Title 42, to close the southern border to many classes of travel.¹ This provision has enabled Border Patrol to summarily expel any migrants who cannot present valid entry documents, without providing the opportunity to seek asylum.² Numerous experts have questioned the stated rationale of the decision, as it has done little to contain the spread of disease.³ In addition, the policy has put migrants in serious danger, as they are often deposited in unfamiliar cities without anyone to receive them.⁴ Criminal organizations have targeted these vulnerable groups of expelled migrants, and as a result, hundreds have been threatened, robbed, assaulted, and kidnapped.⁵ Since assuming office, President Biden has largely left the system in place,⁶ albeit with small exceptions for cases involving children and certain humanitarian concerns.⁷ As such, many migrants continue to suffer the detrimental effects of this restrictive immigration policy.⁸

American Oversight seeks records with the potential to shed light on the expulsion of vulnerable migrants at the southern border in the midst of a global pandemic.

¹ See 85 Fed. Reg. 16,559 (Mar. 24, 2020).

² Am. Immigr. Council, *Guide to Title 42 Expulsions at the Border* (Mar. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf.

³ Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, Assoc. Press (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

⁴ Molly O'Toole, *'Sitting Ducks for Organized Crime': How Biden Border Policy Fuels Migrant Kidnapping, Extortion*, L.A. Times (Apr. 28, 2021, 6:00 AM), <https://www.latimes.com/politics/story/2021-04-28/biden-title-42-policy-fueling-kidnappings-of-migrant-families-at-border-and-extortion-of-u-s-relatives>.

⁵ Hum. Rts. First, *Tracker of Reported Attacks During the Biden Administration Against Asylum Seekers and Migrants Who Are Stranded in and/or Expelled to Mexico* (Apr. 2021), <https://www.humanrightsfirst.org/sites/default/files/AttacksonAsylumSeekersStrandedinMexicoDuringBidenAdministration.pdf>.

⁶ Nicole Narea, *Biden is Quietly Enforcing One of Trump's Most Anti-Immigrant Policies*, Vox (Apr. 29, 2021, 12:50 PM), <https://www.vox.com/policy-and-politics/22398712/biden-title-42-migrant-border-expel>.

⁷ Hamed Aleaziz, *Biden Officials Are Considering a Process to Allow Some "Vulnerable" Immigrants to Avoid Trump-Era Border Restrictions*, BuzzFeed News (Apr. 29, 2021, 5:56 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrants-humanitarian-exemptions-us-border>.

⁸ See Narea, *supra* note 6.

Requested Records

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

All records reflecting any directive, order, decision, protocol, or guidance regarding testing migrants for the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, prior to their expulsion from the United States under Title 42.

Responsive records include, but are not limited, to:

1. Determinations about whether and when to test migrants
2. Records related to the procurement, administration, and processing of tests
3. Determinations about how to respond to positive test results

American Oversight believes your agency is best positioned to determine where responsive records may reside. However, we request that at a minimum, you search the files of the following offices:

Department of Homeland Security

1. Immediate Office of the Secretary
2. Office of Strategy, Policy, and Plans

Customs and Border Protection

1. Immediate Office of the Commissioner
2. Immediate Office of the Executive Assistant Commissioner for Field Operations
3. Immediate Office of the Chief of Border Patrol
4. Offices for Big Bend Sector, Del Rio Sector, El Centro Sector, El Paso Sector, Laredo Sector, Rio Grande Valley Sector, San Diego Sector, Tucson Sector, and Yuma Sector of Border Patrol

Department of Health and Human Services

1. Immediate Office of the Secretary
2. Immediate Office of the Assistant Secretary for Health
3. Immediate Office of the Assistant Secretary for Preparedness and Response

U.S. Citizenship and Immigration Services Officials

1. Anyone serving as Director, including Tracy Renaud and Ken Cuccinelli
2. Anyone serving as Deputy Director, including Larry C. DeNayer
3. Anyone serving as Deputy Director for Policy, including Joseph Edlow
4. Anyone serving as Chief of Staff, including Felicia Escobar and Aaron Calkins

5. Anyone serving as Chief Counsel, including A. Ashley Tabaddor and George Fishman
6. Anyone serving as Chief of the Office of the Executive Secretariat, including Stephen Dove
7. Anyone serving as Associate Director, Refugee, Asylum and International Operations (RAIO), including Jennifer B. Higgins
8. Anyone serving as Associate Director, Fraud Detection and National Security Director, including Matthew D. Emrich
9. Anyone serving as Associate Director, Field Operations Directorate, including Michael Valverde and Daniel Renaud
10. Anyone serving as Chief of the Office of Policy and Strategy, including Amanda Baran and Robert Law

Centers for Disease Control and Prevention

1. Immediate Office of the Director
2. Division of Migration and Quarantine
3. Immediate Office of the Associate Director for Policy and Strategy

Please provide all responsive records from March 1, 2020 through the date of the search.

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."⁹ The public has a significant interest in the expulsion of immigrants under Title 42.¹⁰ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the role of key agency officials in implementing the policy. 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.

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ See, e.g., Claire Hansen, *Pressure Amps Up on Biden to Rescind Title 42 Border Order*, U.S. News (Jun. 3, 2021, 2:27 PM), <https://www.usnews.com/news/national-news/articles/2021-06-03/pressure-amps-up-on-biden-to-rescind-title-42-border-order>.

This request is primarily and fundamentally for non-commercial purposes.¹¹ 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.¹²

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.¹³ 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;¹⁴ posting records and editorial content about the federal government's response to the Coronavirus pandemic;¹⁵ posting records received as part of American 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;¹⁶ 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

¹¹ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹² American Oversight currently has approximately 15,500 page likes on Facebook and 104,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited July 20, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 20, 2020).

¹³ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

¹⁴ *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

¹⁵ 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>.

¹⁶ 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;¹⁷ and posting records and analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹⁸

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

¹⁷ *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>.

¹⁸ 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 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.¹⁹ 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.²⁰

- 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,²¹ 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.

¹⁹ 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).

²⁰ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²¹ 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.

Sincerely,

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