

EXHIBIT B



May 5, 2023

VIA EMAIL

Secretary of the Army
Office of Information and Privacy (NGB/JA-OIP)
111 South George Mason Drive
AH2 Suite 319B
Arlington, VA 22204-1373
NGB.FOIA@army.mil

Re: Freedom of Information Act Appeal – Case No. F23-0098

Dear FOIA Appeals Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(6)(A), and the implementing regulations of the Department of Defense (DOD), 32 C.F.R. pt. 286, American Oversight submits the following administrative appeal.

Background

On March 15, 2023, American Oversight submitted a FOIA request to the Texas Army National Guard (“TX ARNG” or “the agency”) seeking the following:

1. Any report of an incident of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel.
2. Any study concerning incidents of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel in the possession of or created, utilized, maintained, received, or distributed by the Texas Army National Guard.
3. Records sufficient to identify the number of incidents or reports of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel, and any ensuing action recommended or executed by your agency, since January 1, 2017, or the earliest date thereafter for which this information is available.

To the extent that this information is aggregated and maintained in a database or spreadsheet,^[1] we would accept as responsive a printout from the database containing fields reflecting the date and key facts of each incident or report



as well as any ensuing action recommended or executed by the Texas Army National Guard. American Oversight does not object to the redaction of names, addresses, or other personally identifying information from records responsive to this request.

Please provide all responsive records from January 1, 2017, through the date the search is conducted.

[1] American Oversight requests responsive data in a Microsoft Excel spreadsheet format, to the extent that your agency maintains such data in a database or other format that can be readily exported into an Excel spreadsheet.

Ex. A.

By email received April 7, 2023, TX ARNG acknowledged receipt of the request and assigned it Case Number F23-0098. Ex. B. The email stated, “A search by the Personnel Records Department failed to locate any records responsive to your request.” *Id.* The email further provided the contact information for Army FOIA Public Liaison Officer Crystle Poge and noted that American Oversight could contact the agency with any questions regarding the request. *Id.*

On April 17, 2023, American Oversight through the undersigned counsel emailed TX ARNG, copying Ms. Poge, to inquire about the Personnel Records Department’s search for records. Ex. C. American Oversight requested information concerning, inter alia, the locations and custodians searched; the date range applied; any key terms, search terms, or other query limitations; and any guidance or parameters used to define the language in American Oversight’s request. *Id.* American Oversight also inquired whether any other department or office was searched besides the Personnel Records Department. *Id.*

As of the date of this appeal, American Oversight has not received a response to its April 17, 2023 email.

The agency’s determination that the requested records do not exist or cannot be located is an adverse determination under DOD regulations. *See* 32 C.F.R. § 286.9(e). Pursuant to the requirements of 32 C.F.R. § 286.11, American Oversight submits this administrative appeal of:

- (1) TX ARNG’s Failure to Provide an Adequate Administrative Determination
- (2) TX ARNG’s Failure to Conduct an Adequate Search for Records

Failure to Provide an Adequate Administrative Determination

TX ARNG’s determination provides no detail regarding the agency’s search, including how it was conducted, which locations and custodians were searched, and how it came to determine that no records responsive to the request exist. American Oversight thus cannot appeal the agency’s response in a fully adequate manner, and American

Oversight reserves the right to challenge search deficiencies and withholdings not described in the agency's bare response.

Failure to Conduct an Adequate Search for Records

An agency fulfills its obligation under FOIA if it can show “beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). TX ARNG has not shown that it conducted a search to meet its burden under this standard. The agency’s failure to conduct an adequate search amounts to an improper withholding under—and violation of—FOIA. *Rodriguez v. U.S. Dep’t of Defense*, 236 F. Supp. 3d 26, 34 (D.D.C. 2017) (“It is axiomatic that an inadequate search for records constitutes an improper withholding under FOIA.”). As an initial matter, as described above, TX ARNG has not provided any information regarding the search to show that it conducted an adequate search.

Public reporting strongly indicates that the agency possesses responsive records. On March 17, 2019, HuffPost reported on leaked chat logs that identified a Texas Army National Guard member as having ties to a white nationalist group.¹ According to the article, the Texas National Guard confirmed to HuffPost that the individual identified was an active member.² On August 7, 2019, HuffPost further reported that a Texas National Guard spokesperson confirmed the individual was still a service member and stated, “We have taken this incident very seriously and have taken corrective action.”³

The public statements by an official spokesperson strongly indicate the existence of records concerning the incident and corrective action. Any such records are ostensibly responsive to American Oversight’s request, which encompasses “[a]ny report of an incident of . . . white nationalist . . . activity or ideology,” as well as “[r]ecords sufficient to identify . . . any ensuing action recommended or executed by your agency . . .” Ex. A. It is not plausible, given the public reporting and the agency’s public statements, that the agency does not possess records responsive to American Oversight’s request.

Conclusion

For the foregoing reasons, TX ARNG has failed to provide an adequate administrative determination and has failed to conduct an adequate search for records. Accordingly, American Oversight requests that TX ARNG:

¹ Christopher Mathias, *Exclusive: 7 U.S. Military Members Identified as Part of White Nationalist Group*, HuffPost (Mar. 17, 2019, 10:00 PM), https://www.huffpost.com/entry/white-nationalists-military-identity-evropa_n_5c8ab70ae4b0d7f6b0f1094b.

² *Id.*

³ Christopher Mathias, *After HuffPost Investigation, 4 White Nationalists Out of U.S. Military -- But Others Allowed to Remain*, HuffPost (Aug. 7, 2019, 6:39 PM), https://www.huffpost.com/entry/white-nationalists-military-kicked-out-huffpost-investigation_n_5d4b0f83e4b0066eb70b9945.

- (a) Conduct adequate searches for the records American Oversight has requested;
- (b) Provide American Oversight with information about the search methods and parameters used to identify responsive records; and
- (c) Promptly release any responsive, non-exempt records, or portions thereof.

Thank you for your consideration of this appeal. As provided in 5 U.S.C. § 552(a)(6)(A)(ii), we look forward to your determination on our appeal within twenty working days.

For questions regarding any part of this appeal or the underlying request for records, please contact Mehreen Rasheed at foia@americanoversight.org or (202) 848-1320.

Sincerely,

/s/ Mehreen Rasheed
Mehreen Rasheed
on behalf of
American Oversight

EXHIBIT A



March 14, 2023

VIA EMAIL

Texas Army National Guard
TAG JFTX-GC (ATTN: FOIA Manager)
P.O. Box 5218
Austin, TX 78763-5218
ng.tx.txarng.mbx.freedom-of-information-act@mail.mil

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.

Requested Records

American Oversight requests that the Texas Army National Guard produce the following records within twenty business days:

1. Any report of an incident of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel.
2. Any study concerning incidents of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel in the possession of or created, utilized, maintained, received, or distributed by the Texas Army National Guard.
3. Records sufficient to identify the number of incidents or reports of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel, and any ensuing action recommended or executed by your agency, since January 1, 2017, or the earliest date thereafter for which this information is available.

To the extent that this information is aggregated and maintained in a database or spreadsheet,¹ we would accept as responsive a printout from the database containing fields reflecting the date and key facts of each incident or report as well as any ensuing action recommended or executed by the Texas Army

¹ American Oversight requests responsive data in a Microsoft Excel spreadsheet format, to the extent that your agency maintains such data in a database or other format that can be readily exported into an Excel spreadsheet.



National Guard. American Oversight does not object to the redaction of names, addresses, or other personally identifying information from records responsive to this request.

Please provide all responsive records from January 1, 2017, 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 operations or activities of the government."² The public has a significant interest in extremism within the U.S. military.³ Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent the U.S. military has taken any action in response to service members identified as planning or engaging in criminal activity or other misconduct based on extremist ideologies. 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

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ Will Carless, *13 Investigations, No Court-Martials: Here's How the US Navy and Marine Corps Quietly Discharged White Supremacists*, USA Today (Apr. 13, 2021, 8:00 AM), <https://www.usatoday.com/in-depth/news/nation/2021/04/13/us-navy-marines-white-supremacy-discharged/4566463001/>; Alicia Tatone, *Inside the U.S. Military's Battle with White Supremacy and Far-Right Extremism*, NBC News (May 25, 2019, 8:32 AM), <https://www.nbcnews.com/think/opinion/inside-u-s-military-s-battle-white-supremacy-far-right-ncna1010221>.

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

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 regular 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 the Trump Administration's contacts with Ukraine and analyses of those contacts;⁷ posting records and editorial content about the federal government's response to the Coronavirus pandemic;⁸ 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;⁹ 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;¹⁰ and posting records and analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹¹

⁵ American Oversight currently has approximately 16,000 followers on Facebook and 112,700 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Mar. 10, 2023); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Mar. 10, 2023).

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

⁷ *Trump Administration's Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁸ 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>.

⁹ 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>.

¹⁰ *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>.

¹¹ 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>.

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.
- 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.¹² 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.¹³
- 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,¹⁴ and many

¹² 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).

¹³ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁴ 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

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.

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 Mehreen Rasheed at

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>.

foia@americanoversight.org or (202) 848-1320. 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/ Mehreen Rasheed
Mehreen Rasheed
on behalf of
American Oversight

EXHIBIT B

Subject: FOIA Response, Case Number F23-0098
Date: Friday, April 7, 2023 at 5:18:30 PM Eastern Daylight Time
From: NG TX TXARNG Mailbox Freedom of Information Act
To: AO Records
CC: NG TX TXARNG Mailbox Freedom of Information Act

EXTERNAL SENDER

Good afternoon,

This is our response to your FOIA/PA request for a copy of:

1. Any report of an incident of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel.
2. Any study concerning incidents of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel in the possession of or created, utilized, maintained, received, or distributed by the Texas Army National Guard.
3. Records sufficient to identify the number of incidents or reports of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology among military personnel, and any ensuing action recommended or executed by your agency, since January 1, 2017, or the earliest date thereafter for which this information is available.

Your request was received on March 15, 2023 and assigned Case Number F23-0098.

A search by the Personnel Records Department failed to locate any records responsive to your request. For any further assistance and to discuss any aspect of your request, you have the right to contact the Army FOIA Public Liaison Officer, Ms. Crystle Poge, by e-mail at usarmy.belvoir.hqda-esa.mbx.rmda-foia-public-liaison@army.mil or by phone at (571) 515-0306. If you are not satisfied with this response, you have the right to appeal to the Secretary of the Army by writing to Office of Information and Privacy (NGB/JA-OIP), 111 South George Mason Drive, AH2 Suite 319B, Arlington, VA 22204-1373, or by e-mail, NGB.FOIA@army.mil. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response. Your appeal should include copies of your original request and this response, as well as a discussion of the reasons supporting your appeal.

If you have any questions regarding your records request, please feel free to contact our office at this email address or (512) 782-5443.

Sincerely,

Open Records
Texas Military Department
Office: 512.782.5443
Fax: 512.782.6988
P.O. Box 5218 (ATTN: FOIA)
Austin, TX 78763

From: AO Records <records@americanoversight.org>
Sent: Wednesday, March 15, 2023 1:29 PM
To: ng.tx.txarng.mbx.freedom-of-information-act@mail.mil
Subject: Public Information Request (TX-ARNG-23-0258)

Dear Public Information Officer:

Please find attached a request for records under the Texas Public Information Act.

Sincerely,
Dylan Winters
Paralegal | American Oversight
records@americanoversight.org |
www.americanoversight.org | @weareoversight

PIR: TX-ARNG-23-0258

EXHIBIT C

Subject: Re: FOIA Response, Case Number F23-0098
Date: Monday, April 17, 2023 at 12:23:55 PM Eastern Daylight Time
From: FOIA
To: NG TX TXARNG Mailbox Freedom of Information Act
CC: usarmy.belvoir.hqda-esa.mbx.rmda-foia-public-liaison@army.mil

Dear Open Records Office,

Thank you for your response to American Oversight's Freedom of Information Act Request filed on March 15, 2023.

In order to help us better understand and evaluate your office's response, can your office please provide details regarding the search that was conducted by the Personnel Records Department, which resulted in no responsive records being located? Specifically, could you please provide all locations and custodians searched (including all databases, file locations, record repositories, email accounts, physical files, etc.); the date range applied to the search; and all key terms, search terms, or any other limitations used to query databases or conduct searches (including any guidance or parameters used to define any part of the phrase "incidents of white supremacist, white nationalist, white separatist, far-right, alt-right, or pro-Nazi activity or ideology")? Can your office also please clarify whether any other department, office, or component of the TX Army National Guard was searched besides the Personnel Records Department, and if so, specify those departments and details of each search?

Thank you very much for your assistance. Please feel free to contact me at the email address provided below.

Best,
Mehreen Rasheed

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Mehreen Rasheed (she/her)
Counsel | American Oversight
foia@americanoversight.org | (202) 848-1320
www.americanoversight.org | @weareoversight

CC: Ms. Crystle Poge, Army FOIA Public Liaison Officer

From: NG TX TXARNG Mailbox Freedom of Information Act <ng.tx.txarng.mbx.freedom-of-information-act@army.mil>
Date: Friday, April 7, 2023 at 5:18 PM
To: AO Records <records@americanoversight.org>
Cc: NG TX TXARNG Mailbox Freedom of Information Act <ng.tx.txarng.mbx.freedom-of-information-act@army.mil>
Subject: FOIA Response, Case Number F23-0098

EXTERNAL SENDER

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Texas Military Department
Office: 512.782.5443
Fax: 512.782.6988
P.O. Box 5218 (ATTN: FOIA)
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Sent: Wednesday, March 15, 2023 1:29 PM
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Subject: Public Information Request (TX-ARNG-23-0258)

Dear Public Information Officer:

Please find attached a request for records under the Texas Public Information Act.

Sincerely,
Dylan Winters
Paralegal | American Oversight
records@americanoversight.org |
www.americanoversight.org | @weareoversight

PIR: TX-ARNG-23-0258