



July 12, 2017

VIA ONLINE PORTAL

U.S. General Services Administration
FOIA Requester Service Center (H1F)
1800 F Street NW, Room 7308
Washington, DC 20405-0001
Via FOIAonline

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the General Services Administration (GSA) implementing regulations, 41 C.F.R. § 105.60, American Oversight makes the following request for records.

On May 11, 2017, President Donald Trump signed Executive Order 13,799, establishing the Presidential Advisory Commission on Election Integrity.¹ The Commission's mission is to "study the registration and voting processes used in Federal elections."² The Commission is subject to public disclosure requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App., but to date has not operated with a commitment to transparency. In fact, the Commission only disclosed its membership in response to a court order.³ American Oversight is seeking records to bring transparency to what has been a thoroughly opaque effort to date in contravention of the law.

Requested Records

American Oversight requests that GSA produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All communications between the GSA Office of the Administrator, Office of General Counsel, Office of Congressional and Intergovernmental Affairs, and the Office of Government-wide Policy, including the Committee Management Secretariat and

¹ Exec. Order No. 13,799 of May 11, 2017, 82 Fed. Reg. 22,389 (May 16, 2017).

² *Id.*

³ See Order, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1320 (D.D.C. July 5, 2017), ECF No. 9, <https://epic.org/privacy/litigation/voter/epic-v-commission/EPIC-v-Commission-court-order-of-July-5.pdf>; Second Decl. of Kris W. Kobach, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1320 (D.D.C. July 6, 2017), ECF No. 11-1, <https://epic.org/privacy/litigation/voter/epic-v-commission/11.1-2nd-Kobach-Declaration.pdf>.



- a. the White House, including Andrew Kossack, anyone from the Office of the Vice President, anyone from the White House Counsel's Office, or anyone else whose email address ends in "eop.gov"; or
- b. Any member or staff member of the Commission including: Kris Kobach, Secretary of State for Kansas; Connie Lawson, Secretary of State of Indiana; Bill Gardner, Secretary of State of New Hampshire; Matt Dunlap, Secretary of State of Maine; Ken Blackwell, former Secretary of State of Ohio; Christy McCormick, Election Assistance Commission; David Dunn, former Arkansas State Representative; Mark Rhodes, Wood County West Virginia Clerk; and Hans von Spakovsky, Senior Legal Fellow, Heritage Foundation; and Luis Borunda, Deputy Secretary of State of Maryland; or
- c. any member of Congress, including congressional staff, regarding the Presidential Advisory Commission on Election Integrity, including its creation, establishment, functions, mission, objectives, management, membership, authority, scope, costs, meetings, and legal obligations.

Please provide all responsive records from January 20, 2017, through the date of the search.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all 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 includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁴ **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**

⁴ 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).

official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁵

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered GSA’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**⁶ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but GSA’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that GSA use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁷ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁸ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁶ 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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

the sought-after information.”⁹ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁰

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 it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹¹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, GSA is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, 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 GSA can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF 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 rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 41 C.F.R. § 105-60.305-13, 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.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

¹² 41 C.F.R. § 105-60.305-13(a).

¹³ 41 C.F.R. § 105-60.305-13(a).

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 government activities and operations.¹⁴ The Presidential Advisory Commission on Election Integrity is subject to the Federal Advisory Committee Act (FACA), which requires that

the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee *shall be available for public inspection and copying at a single location* in the office of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.¹⁵

The D.C. Circuit Court of Appeals reiterated the right of public inspection when it held as follows:

[U]nder section 10(b) of FACA an agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request disclosure in order for FACA 10(b) materials to be made available. Thus, whenever practicable, *all 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.*¹⁶

The FOIA additionally provides a right of access so the public can understand what its government is up to. The Commission, however, has yet to make available any of the Commission’s records.¹⁷ Nor have officials at federal agencies provided documentation of what, if any, support and cooperation they have provided. Without access to those records, the public is not in a position to evaluate how the Commission is conducting its work, to provide input to the Commission’s deliberations, or assess whether the Commission is acting within its legal authority and comporting with its legal obligations. Multiple nonprofit organizations as well as state legislators have already sued to require the Commission to comply with the FACA.¹⁸ The records responsive to this FOIA

¹⁴ 41 C.F.R. § 105-60.305-13(a)(1)-(3).

¹⁵ 5 U.S.C. App. § 10(b) (emphasis added).

¹⁶ Memorandum for Comm. Mgmt. Officers from James L. Dean, Dir., Comm. Mgmt. Secretariat (March 14, 2000), <https://www.gsa.gov/portal/content/100785> (quoting *Food Chem. News v. Dep’t of Health & Human Servs.*, 980 F.2d 1468, 1469 (D.C. Cir. 1992)).

¹⁷ See Britain Eakin, *ACLU Sues Administration over Voting Commission Transparency*, COURTHOUSE NEWS SERV., July 11, 2017, <http://www.courthousenews.com/aclu-sues-administration-voting-commission-transparency-2/>.

¹⁸ Holly Ramer & Geoff Mulvihill, *Lawsuits Filed over Trump Voting Commission Requests*, WASH. POST, July 6, 2017, https://www.washingtonpost.com/national/lawsuits-filed-over-trump-voting-commission-requests/2017/07/06/7fb3b442-628a-11e7-80a2-8c226031ac3f_story.html?utm_term=.79fd478d5f27; Diamond Naga Siu, *ACLU Sues Trump*

request would begin to shed light on the activities of the Commission and ameliorate the Commission's FACA violations to date.

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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.²⁰ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,²¹ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²² As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²³

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 41 C.F.R. § 105-60.402-2(c), American Oversight requests that the GSA expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need

over Election Integrity Commission, POLITICO (July 10, 2017, 2:10 PM), <http://www.politico.com/story/2017/07/10/aclu-sue-trump-election-integrity-commission-240368>; Mark Joseph Stern, *Trump Voter Fraud Commission Halts Data Collection Amid Torrent of Lawsuits and Complaints*, SLATE (July 10, 2017, 6:41 PM), http://www.slate.com/blogs/the_slatest/2017/07/10/trump_voter_fraud_commission_halts_data_collection_amidst_lawsuits.html.

¹⁹ 41 C.F.R. § 105-60.305-13(a)(4).

²⁰ American Oversight currently has over 11,000 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 12, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 12, 2017).

²¹ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²² *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

to inform the public about the federal government activity that is the subject of this request. The president has been fixated on the idea of voter fraud since he secured office with an electoral-college victory despite losing the popular vote.²⁴ Investigating such “fraud” was an early initiative of his administration,²⁵ formalized when he signed Executive Order 13,799, establishing the Presidential Advisory Commission on Election Integrity.²⁶ The president’s obsession has now implicated the privacy of the hundreds of millions of registered voters across the country²⁷ with the Commission’s June 28, 2017 request to states and the District of Columbia to be provided with the name, address, date of birth, party affiliation, the last four digits of the Social Security number, and voting history of all registered voters.²⁸ Moreover, the Commission is requesting this information on an accelerated timeframe with responses from the states due on July 14, 2017,²⁹ a request and timeline that has prompted significant legal action to prevent the invasion of the private information of three in five Americans.³⁰

²⁴ See Peter Baker & Maggie Haberman, *The Election Is Over, but Trump Can’t Seem to Get Past It*, N.Y. TIMES, May 13, 2017, <https://www.nytimes.com/2017/05/13/us/politics/election-is-over-but-trump-still-cant-seem-to-get-past-it.html>; *Trump Again Claims He ‘Would Have Won’ Popular Vote*, BBCNEWS, Dec. 21, 2016, <http://www.bbc.com/news/world-us-canada-38397594>; Emma Green, *The White House Clings to False Claims of Massive Voter Fraud*, THE ATLANTIC, Jan. 24, 2017, <https://www.theatlantic.com/politics/archive/2017/01/trump-is-still-concerned-about-voter-fraud/514319/>; Ros Krasny, *Trump Claims Millions Voted Illegally, Without Giving Proof*, BLOOMBERG (Nov. 28, 2016, 3:05 PM), <https://www.bloomberg.com/news/articles/2016-11-27/trump-suggesting-voter-fraud-says-he-won-the-popular-vote>; Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES, Jan. 23, 2017, <https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html>.

²⁵ See Green, *supra* note 24; Dan Merica et al., *Trump Considers Executive Order on Voter Fraud*, CNNPOLITICS (Jan. 25, 2017, 6:57 PM), <http://www.cnn.com/2017/01/25/politics/trump-calls-for-major-investigation-into-voter-fraud/index.html>.

²⁶ Exec. Order No. 13,799 of May 11, 2017, 82 Fed. Reg. 22,389 (May 16, 2017).

²⁷ Shane Goldmacher, *America Hits New Landmark: 200 Million Registered Voters*, POLITICO, (Oct. 19, 2016, 1:57 PM), <http://www.politico.com/story/2016/10/how-many-registered-voters-are-in-america-2016-229993>.

²⁸ Christopher Ingraham, *Trump’s Voter-Fraud Commission Wants to Know Voting History, Party ID, and the Address of Every Voter in the U.S.*, WASH. POST, June 29, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/06/29/trumps-voter-fraud-commission-wants-to-know-the-voting-history-party-id-and-address-of-every-voter-in-america/?utm_term=.c652883f94ed.

²⁹ See Letter from Kris W. Kobach, Vice Chair, Presidential Advisory Comm’n on Election Integrity, to Denise Merrill, Conn. Sec’y of State (June 28, 2017), <https://www.washingtonpost.com/blogs/wonkblog/files/2017/06/PEIC-Letter-to-Connecticut-1.pdf>.

³⁰ Andrew M. Harris, *Privacy Rights Group Sues Election Integrity Panel*, BLOOMBERG POLITICS (July 3, 2017, 6:45 PM), <https://www.bloomberg.com/news/articles/2017-07-03/privacy-rights-group-sues-trump-s-election-integrity-commission>.

As significantly, this entire process is occurring without the opportunity for public scrutiny. As noted above, FACA requires that the Commission proactively disclose its records.³¹ Yet the Commission has failed to do so and now faces numerous legal challenges.³² The Commission's first public meeting has been noticed for July 19,³³ and the government continues to resist the calls to comply with FACA and conduct its activities transparently. A response to this FOIA request is urgently needed to cure the Commission's opacity and inform the public of its activities, and to provide the public with the information it needs to participate meaningfully in the Commission's deliberations consistent with the requirements of FACA.

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 accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,³⁴ 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."³⁵ 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 promote their availability on social media platforms, such as Facebook and Twitter.³⁶ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,³⁷ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.³⁸ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.³⁹

³¹ See *supra* notes 15 & 16.

³² See Eakin, *supra* note 17; Harris, *supra* note 30; Ramer & Mulvihill, *supra* note 18; Siu, *supra* note 18; Stern, *supra* note 18.

³³ Meeting Notice, 82 Fed. Reg. 31,063 (July 5, 2017); Supplemental Meeting Notice, 82 Fed. Reg. 31,608 (July 7, 2017).

³⁴ 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).

³⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

³⁶ American Oversight currently has over 11,000 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 12, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 12, 2017).

³⁷ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

³⁸ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

³⁹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

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, have any questions, or foresee any problems in fully releasing the requested records, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5246. 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,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Austin R. Evers
Executive Director
American Oversight