



November 14, 2017

VIA ELECTRONIC MAIL

FOIA Officer
Federal Emergency Management Agency
500 C Street SW, Room 840
Washington, DC 20472
fema-foia@fema.dhs.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

In September Hurricane Maria devastated Puerto Rico and the U.S. Virgin Islands. DHS has received criticism for its response efforts,¹ but DHS's social media, as well as that of its component agencies, has emphasized the recovery work being done in the Caribbean.² American Oversight submits this FOIA to understand how the agency is framing its response efforts.

Requested Records

American Oversight requests that the Federal Emergency Management Agency (FEMA) produce the following within twenty business days:

1. All electronic mail containing any of the words in Column A and any of the terms in Column B:

¹ See, e.g., James Carroll, *What Puerto Rico Needs After Hurricane Maria*, NEW YORKER, Sept. 26, 2017, <https://www.newyorker.com/news/news-desk/what-puerto-rico-needs-after-hurricane-maria>; Mark Landler, *Trump Lobs Praise, and Paper Towels, to Puerto Rico Storm Victims*, N.Y. TIMES, Oct. 3, 2017, <https://www.nytimes.com/2017/10/03/us/puerto-rico-trump-hurricane.html>; Oliver Milman, *Six Weeks After Hurricane Maria, Puerto Ricans Still Waiting for Help from FEMA*, THE GUARDIAN (Nov. 9, 2017, 1:58 PM), <https://www.theguardian.com/world/2017/nov/09/six-weeks-after-hurricane-maria-puerto-ricans-still-waiting-for-help-from-fema>.

² See, e.g., Homeland Security (@DHSgov), TWITTER (Sept. 28, 2017, 2:40 PM), <https://twitter.com/DHSgov/status/913473539105312768>; FEMA (@fema), TWITTER (Oct. 18, 2017, 5:47 PM), <https://twitter.com/fema/status/920768357959454721>.



Column A	Column B
Social Twitter Tweet Facebook Hashtag #	Relief Recovery Puerto Rico PuertoRico PR Virgin Islands USVI Hurricane Maria HurricaneMaria Irma HurricaneIrma

2. All electronic mail containing any of the terms in Column C and any of the words in Column D:

Column C	Column D
Puerto Rico PR Virgin Islands USVI Maria Irma	S1 S2 Secretary DepSec Duke Kelly

The search for responsive records can be limited to:

- Office of the Administrator
- Office of the Deputy Administrator
- Office of External Affairs, including the Office of the Director, the Office of the Deputy Director, the Congressional Affairs Division, the Disaster Operations Division, the Intergovernmental Affairs Division, the Public Affairs Division, the Strategic Communications Division, and the Ready Campaign Division
- Office of the Regional Administrator for Region II and the Office of the Deputy Administrator for Region II.

Please provide all responsive records from August 15, 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 DHS 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.³ **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, through negligence or willfulness, failed to meet their obligations.**⁴

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 DHS’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.**⁵ 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

³ 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).

⁴ 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)).

⁵ 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>.

custodian may have deleted a responsive email from his or her email program, but DHS's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DHS 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.”⁶ 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.”⁷ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁸ 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.’”⁹

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.¹⁰ 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, DHS 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 DHS can decrease the likelihood of costly and time-consuming litigation in the future.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

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 a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), 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.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”¹³ The requested records will help American Oversight and the general public understand how the government has responded to natural disasters that have devastated Puerto Rico and the U.S. Virgin Islands.¹⁴ Moreover, in the face of the disconnect between how the government is discussing its recovery efforts in the Caribbean and how news outlets are describing the efforts,¹⁵ the requested records will reveal whether, how, and to what extent FEMA is trying to create a particular narrative regarding the federal government’s work on the ground. Two months after the hurricanes hit, media is still regularly reporting on the recovery and relief efforts.¹⁶ As discussed below, American Oversight has the capacity and intention to inform a broad audience and interested public about the government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁷ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the

¹¹ 6 C.F.R. § 5.11(k)(1)(i).

¹² 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁴ Yalda Hakim, *Puerto Rico’s Hard Road to Recovery After Hurricane Maria*, BBC NEWS, Nov. 10, 2017, <http://www.bbc.com/news/world-us-canada-41929287>; Fredreka Schouten, *No Electricity, Homes in Ruins: A Reporter Goes Home and Finds Misery, Hope and Resilience in the U.S. Virgin Islands*, USA TODAY (Nov. 9, 2017, 11:12 AM), <https://www.usatoday.com/story/news/2017/11/09/no-electricity-homes-ruins-reporter-goes-home-and-finds-misery-hope-and-resilience-u-s-virgin-island/826573001/>.

¹⁵ *See* Eric Levenson, *White House Statements on Puerto Rico Clash with Ground Reports*, CNN (Sept. 30, 2017, 10:51 AM), <http://www.cnn.com/2017/09/29/us/puerto-rico-white-house-ground-reports-clash/index.html>.

¹⁶ *See* David Meyer, *Puerto Rico Is Still Mostly Powerless After Cancelling a Controversial Energy Contract*, FORTUNE (Nov. 13, 2017, 7:08 AM), <http://fortune.com/2017/11/13/puerto-rico-power-whitefish/>; Hakim, *supra* note 14; Milman, *supra* note 1; Schouten, *supra* note 14.

¹⁷ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

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 our public website and promote their availability on social media platforms, such as Facebook and Twitter.¹⁸ 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, American Oversight promptly posted the records to its website¹⁹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁰ Additionally, this particular FOIA request is part of a public project conducted by American Oversight 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.²¹

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DHS 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,



Austin R. Evers
Executive Director
American Oversight

¹⁸ American Oversight currently has approximately 11,700 page likes on Facebook, and 37,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 9, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 9, 2017).

¹⁹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁰ *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>.

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.