



June 29, 2021

VIA EMAIL – FOIARequest@osc.gov

ATTN: Chief FOIA Officer Mahala Dar
U.S. Office of Special Counsel
1730 M St., N.W. (Suite 218)
Washington, DC 20036-4505

Freedom of Information Act Request: Hatch Act Investigation Records

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

I. Background

The Supreme Court has held that “[t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.”¹ This grant of executive power includes the power to enforce the laws passed by Congress.

The Office of Special Counsel (“OSC”) describes itself as “an independent federal investigative and prosecutorial agency,” with jurisdiction to “enforce restrictions on political activity by government employees.”² The Office of Special Counsel (OSC) is considered an independent agency, which means that it is insulated from presidential supervision.

However, if constitutional law enforcement is vested in the President and OSC is insulated from the President, logic would dictate that OSC lacks law enforcement power. Although the relevant Supreme Court doctrines exist as a patchwork, the

¹ *Kendall v. United States*, 37 U.S. 524, 610 (1838).

² Office of Special Counsel, “Policy Statement on Disclosure of Information from OSC Program Files” (Jan. 16, 2004).

consistent thread of the relevant precedent suggests that when agencies like OSC conduct investigations, their actions “are not to be construed as authorizing enforcement”³ and, instead, OSC inquiries, like those exercisable by congressional committees, “are within the power of Congress to command” and are the result of Congress’s “authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.”⁴ Similar to how Congress is not constitutionally permitted to enforce the law, OSC’s investigative activities are cabined by its limited authority to merely administer legislative policy.⁵ Further, the Administrative Procedure Act, as amended by the Freedom of Information Act (FOIA), requires policymaking by the bureaucracy to be subject to public disclosure.⁶

On October 16, 2020, a nongovernmental organization requested that OSC conduct “an investigation of and remedial action for probable Hatch Act violation(s)” arising from former Secretary of State Mike Pompeo’s alleged efforts to release the e-mails of former Secretary Hillary Clinton ahead of the November 2020 election.⁷ Three days later, OSC confirmed it had opened an investigative file.⁸ While OSC believes itself to be politically insulated from the president, that its investigative agenda is set by congressional committees⁹ and special interests armed with quasi-legislative information access rights simultaneously reveals its legislative capture and its subsequent disqualification from exercising constitutional law enforcement responsibilities due to its failure to meet the strict constitutional standards that attach to such responsibilities.¹⁰

To illustrate OSC’s role as a policymaker not a neutral enforcer of law, its October 19, 2020, confirmation of its Hatch Act investigation of former Secretary Pompeo stands in stark contrast to its other decisions in response to interest groups seeking information, where it has refused to confirm or deny the existence of “law enforcement

³ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946).

⁴ *Id.*

⁵ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *accord. Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (“enforcement of the policy established by Congress”). *Accord* 5 U.S.C. § 1212(e) (authorizing the Special Counsel to prescribe regulations necessary to perform its statutory functions).

⁶ 5 U.S.C. § 552(a)(1)(D) (OSC’s general statements of enforcement policy must be published in the Federal Register).

⁷ See e.g. https://www.americanoversight.org/wp-content/uploads/2020/10/20201019_AO_HatchAct_OSC_Email.pdf.

⁸ *Id.*

⁹ Ryan Chatelain, *Agency Investigating Whether Pompeo Violated Hatch Act*, NY1 (Oct. 26, 2020), available at <https://www.ny1.com/nyc/all-boroughs/politics/2020/10/26/agency-investigating-whether-pompeo-violated-hatch-act--house-dems-say>.

¹⁰ Note that as a matter of law the Special Counsel lacks enforcement discretion. 5 U.S.C. § 1216(a) (“the Special Counsel shall . . . conduct an investigation of any allegation concerning”).

records concerning an individual.”¹¹ In short, OSC’s unique treatment of Trump Administration officials can lead reasonable people to question its claim of neutrality.

AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public. Therefore, to ensure OSC’s limited role as an administrative policymaker is subject to public oversight, AFL requests access to the following records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, within twenty business days.

II. Requested Records

A. For the time period from October 16, 2020, to January 21, 2021:

1. All statements of policy, guidance documents, rules of procedure, and generally applicable rules or interpretations referring or relating to Hatch Act investigations and enforcement.¹²
2. All records referring or relating to the Mike Pompeo Hatch Act case file opened on or around October 19, 2020.
3. All records, including but not limited to processing notes, search terms and evidence of located records, relating to the OSC’s search for the records identified in Request 1, above.

B. Additionally, AFL requests access to the following records from January 20, 2017, to January 21, 2021:

1. All records evidencing investigations of allegations concerning a federal agency or department’s arbitrary or capricious withholding of information prohibited under FOIA.
2. All records evidencing investigations of allegations concerning activities prohibited by any civil service law, rule, or regulation, inclusive of OSC’s investigations into alleged prohibited personnel practices, against employees

¹¹ See e.g. OSC response to Freedom of Information Act Appeal (#AF-17-0006) (July 10, 2017), available at https://www.governmentattic.org/30docs/OSCfoiaAppealsResponses_2015-2018.pdf#page=12.

¹² These documents would include but not be limited to notices to individuals subject to investigation disclosing their Privacy Act rights, requirements that all information collected from outside the OSC alleging Hatch Act violations is collected pursuant to the Paperwork Reduction Act, investigative techniques, policies of enforcement discretion, enforcement recommendation memoranda, and legal memoranda concerning its authority to investigate confidential, policy-making, policy-determining, or policy-advocating employees appointed by the President but who are not Senate confirmed. See 5 U.S.C. § 1215(b).

who are in confidential, policy-determining, policy-making, or policy-advocating character, and where whistleblower disclosures included communications concerning policy decisions in the exercise of lawful discretionary authority under the Constitution.

3. All records of Hatch Act investigations of Office of Special Counsel, Office of Inspector General, Office of Government Ethics, National Archives and Records Administration, or Merit System Protection Board employees.

III. Construction and Redactions

Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then OSC must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; see also *Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, OSC should produce email and calendar attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, 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 those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- 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. 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; AFL 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.

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, 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; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If 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.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 5 CFR § 1820.7, AFL requests a waiver of any and all applicable fees. This statute and regulation provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹³

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear

¹³ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest.

Second, in this case, a fee waiver is appropriate because of the public's right to know whether OSC is operating as a true independent agency or if it is doing the bidding of politically motivated non-governmental entities. In addition, as American First Legal is a non-profit, tax-exempt organization as defined by the Internal Revenue Code, it has no commercial interest in making this request.

V. Record Preservation Requirement

We request that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁴

VI. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis.

If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VII. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient

¹⁴ See 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records."); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

production of records of interest to AFL, please do not hesitate to contact me at info@aflegal.org.

Thank you,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation