

August 6, 2020

VIA ONLINE PORTAL

Travis Lewis
Deputy Director, Office of Accountability and Transparency
U.S. General Services Administration
FOIA Requester Service Center (H3A)
1800 F St. NW, Room 7308
Washington, D.C. 20405

Re: Appeal of FOIA Request GSA-2020-000925

Dear Mr. Lewis:

Citizens for Responsibility and Ethics in Washington (“CREW”) hereby appeals the initial determination by the U.S. General Services Administration (“GSA”) concerning CREW’s request under the Freedom of Information Act (“FOIA”) for records pertaining to the Agency Transition Directors Council (“ATDC”), those related to how COVID-19 may be impacting the presidential transition process, and additional communications between senior GSA officials and the presidential campaigns of Donald J. Trump or Joseph R. Biden. As set forth below, the 43 pages of records provided by GSA to CREW in response do not reasonably constitute the sum total of all responsive records. Further, GSA improperly relied on FOIA Exemptions 5 to withhold a vast swath of material and Exemption 6 without conducting the appropriate balancing of interests.

On June 5, 2020, CREW submitted to the GSA by email a request for copies of: 1) communications directed to or originating from named members of GSA senior leadership regarding the ATDC meeting hosted by the Office of Management and Budget and the GSA on or around May 27, 2020; 2) all meeting agendas, minutes, notes, or attendance lists for the above meeting; 3) all email communications sent to, copied to, or received by senior GSA leadership related to the impact of COVID-19 on the presidential transition process; 4) all communications sent to, copied to, or received by senior GSA leadership regarding the May 27 meeting regarding the ATDC; 5) all communications sent to, copied to, or received by senior GSA leadership regarding future ATDC-related meetings after May 27; and 6) any email communications between or among GSA senior leadership and any representative of the presidential campaigns of Donald J. Trump and Joseph R. Biden. For your convenience, a copy of this request is enclosed.

On July 17, 2020, GSA provided CREW with its final response to the request, consisting of 43 pages of responsive records that included (1) 24 pages comprising 10 emails principally regarding conference call and meeting logistics for the May 27, 2020 ATDC meeting, along with two emails sent post-May 27 regarding future meetings of the ATDC; (2) a 16-slide PowerPoint presentation dated May 27, 2020 outlining the duties of the ATDC ahead of the 2020 election;

and (3) a three-page summary of the May 27, 2020 ATDC meeting that GSA effectively redacted in its entirety claiming FOIA Exemptions (b)(5) and (b)(6)¹. Copies of these three records are also enclosed.

Failure to Conduct an Adequate Search

The paucity of documents suggests GSA failed to conduct an adequate search reasonably designed to uncover all responsive documents. In responding to a FOIA request an agency must conduct a search for records that “us[es] methods which can be reasonably expected to produce the information requested.”² For multiple reasons, GSA failed to meet this standard.

First, as is well established, the transition process is integral to ensuring that government officials abide by federal ethics laws and are free of conflicts of interest and preserving presidential and federal records, and is subject to stringent congressional oversight.³ As such, it is simply inconceivable that 12 emails are the sum total of responsive communications among GSA senior leadership between May 5 and June 5, 2020 regarding ATDC meetings, the potential impact of COVID-19 on the transition, or the inclusion of presidential campaign representatives in the transition process.

GSA appears to have been less than fully responsive regarding CREW’s second request, “any and all agendas, meeting notes, summaries, or attendance lists prepared for or distributed at the Agency Transition Directors Council meeting hosted by the Office of Management and Budget and the GSA on or around May 27, 2020.” Though GSA supplied a meeting summary, GSA redacted all but approximately 100 words of the document, citing FOIA Exemptions 5 and 6.⁴ Because of the extent of the redactions, CREW has no way to ascertain if this is the complete record of the May 27 meeting, nor if the redactions were appropriate. Relatedly, GSA produced the slide deck presented at the May 27 meeting, which notes that the meeting included time for “[r]emarks from DOJ, NARA, OGE, and OPM.”⁵ However, GSA’s response includes no transcripts, summaries, or any other indication of what these remarks were. CREW seeks confirmation from GSA that the ATDC membership roster listed on pages 3 and 4 of the provided PowerPoint deck⁶ corresponds with the actual meeting attendance, as that deck was circulated pre-meeting, and again, the meeting notes are entirely redacted.

Second, The GSA record contains just two emails sent after the May 27 ATDC meeting despite a full week elapsing between that meeting and CREW’s FOIA request. Both emails

¹ See 5 U.S.C. Â§ 552(b)(5)-(6) (2018).

² *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quotation and citation omitted).

³ U.S. General Services Administration, Presidential Transition Directory: Federal Records, *available at* <https://www.gsa.gov/governmentwide-initiatives/presidential-transition-directory/records-management-guidelines/federal-records>, (last visited Apr. 22, 2020); *see also* U.S. General Services Administration, Presidential Transition Directory: Ethics and Accountability, <https://www.gsa.gov/governmentwide-initiatives/presidential-transition-directory/ethics-and-accountability/office-of-government-ethics>, (last visited Apr. 22, 2020).

⁴ Minutes of the Agency Transition Dirs. Council Meeting of May 27, 2020 (on file with author)

⁵ Agency Transition Dir. Council May 27, 2020 Presentation, Agency Transition Dir. Council, at 13 (2020) (on file with author).

⁶ Agency Transition Dirs. Council May 27, 2020 Presentation, Agency Transition Dirs. Council, at 3-4 (2020) (on file with author).

originated from Mary Gibert, Federal Transition Coordinator and GSA Associate Administrator, with no other responses or discussion produced. Given that the intent of the May 27 meeting was to lay the groundwork for future sessions,⁷ that the invite for the May 27 meeting had at least 29 invitees, and that the slide deck for the meeting indicates there were at least 22 representatives of various federal agencies present, it is not plausible that there were no other related email traffic whatsoever during the week following the meeting regarding future ATDC sessions.

Moreover, GSA's August 3 letter to Congress regarding ATDC progress references at least two additional ATDC meetings that occurred in June and July.⁸ While preparations may not have been in an advanced stage at the time of CREW's FOIA request, the provided Mary Gibert emails of June 2 and 4 indicate that at least some planning for future meetings had already been conducted by this point. All this is further evidence that GSA failed to conduct a search reasonably designed to uncover responsive records.

Third, GSA appears to have ignored or overlooked CREW's third request: "all email communications sent to, copied to, or received by [select GSA officials] from May 5, 2020 to the present referring or related to the impact of COVID-19 or the coronavirus on the presidential transition process." Given how completely COVID-19 has disrupted the lives of American citizens, the operations of government, and the conduct of presidential campaigns, GSA's failure to produce a single COVID-19-related communication further highlights the incompleteness of the records provided to CREW.

Finally, GSA has produced no records that contain any references to CREW's sixth request seeking communications with representatives of the Trump or Biden campaigns. In its May 13 progress report, GSA noted that the White House Transition Coordinating Council, which operates in conjunction with the ATDC, has on it a "transition representative for each eligible candidate,"⁹ presumably meaning that those representatives had been selected by this point. Given any campaign's strong intrinsic interests in the presidential transition process, it is highly unlikely that there was zero email communication between either the Trump or Biden campaign and the listed members of the GSA/ATDC from May 5 to June 5, 2020.

GSA Improperly Relied on Exemption 5 and 6 to Withhold Material That Does Not Fall Within the Scope of Those Exemptions

Beyond the inadequacy of its search, GSA improperly relied on Exemptions 5 and 6 to extensively redact the records it did uncover. The deliberative process privilege that Exemption 5 protects requires a showing that the documents "bear on policy formulation."¹⁰ Further, the

⁷ Email from Mary D. Gibert, Federal Transition Coordinator, to ATDC members (May 22, 2020, 4:10 P.M.) (on file with author).

⁸ Letter from Federal Transition Coordinator Mary D. Gibert to Rep. Ron Johnson and Sen. Gary Peters, at 2 (August 3, 2020) (available at <https://bit.ly/3fBHJUo>.)

⁹ 2020 Presidential Transition Activities: Progress Report as of May 2020, Gen. Serv. Admin. at 3, May 13, 2020, available at https://www.gsa.gov/cdnstatic/2020_Presidential_Transition_Activities_6Month_ReporttoCongress.pdf.

¹⁰ See *Heffernan v. Azar*, 317 F. Supp. 3d 94, 126 n.18 (D.D.C. 2018).

agency must separate portions of documents that reflect analytical or deliberative processes from those that are purely factual in nature, and release the latter.¹¹

Here, however, the breadth of the redactions suggests GSA failed to conduct any such analysis. Moreover, the nature of the documents, such as a 16-slide PowerPoint presentation outlining the duties of the ATDC, strongly suggests they have a factual component, yet GSA has also withheld those facts under Exemption 5. GSA should therefore be directed to reprocess the documents and disclose all factual, non-deliberative material.

GSA also improperly relied on Exemption 6 to the extent it withheld names and other identifying information of high-level officials or non-agency third parties. Exemption 6 permits agencies to withhold personal information only if “disclosure would comprise a substantial, as opposed to a *de minimis*, privacy interest.”¹² The agency must also weigh the balance of the individual’s right of privacy against a “presumption in favor of disclosure [that] is strong as can be found anywhere in [FOIA].”¹³ GSA’s blanket justification for the Exemption 6 redactions, that “public disclosure of [names and emails of multiple officials] would constitute a clearly unwarranted invasion of personal privacy,” does not suffice to demonstrate, as the law requires, a substantial privacy interest in this information or that such an interest outweighs the public’s interest in disclosure.

Finally, with respect to both GSA’s Exemption 5 and 6 claims, the agency has provided insufficient detail to meet its obligation under the FOIA Improvement Act of 2016 to demonstrate that “foreseeable harm” could occur as a result from releasing the records, a requirement independent of the requirements for a given exemption category.¹⁴ An agency must release a record—even if it falls within a FOIA exemption—so long as doing so would not “reasonably harm an exemption-protected interest and if the law does not prohibit the disclosure.”¹⁵ GSA has provided no evidence that the release of the requested records could reasonably harm any legitimately protected interest of the agency. Indeed, the nature and context of CREW’s request suggests GSA may be withholding some of this material to avoid potential “embarrass[ment]” if “errors and failures [are] revealed”¹⁶ or if the material shows that GSA/ATDC has made only minimal progress toward its mandate of facilitating a fluid presidential transition.

In sum, CREW requested specific and discrete information dating from May 5 to June 5, 2020: records of or reflecting communications regarding meetings of the Agency Transition Directors Council, the potential impact of COVID-19 on the transition, and any communications with representatives of the Trump and Biden presidential campaigns. Despite this clarity, GSA provided only a few, select records that omit key portions of the request. For all these reasons,

¹¹ See *Evans v. OPM*, 276 F. Supp. 2d 34, 40 (D.D.C. 2003).

¹² *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989).

¹³ *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002); see also *Multi Ag Media LLC v. USDA*, 515 F.3d 1224 1227 (D.C. Cir. 2008).


¹⁴ See Pub. L. No. 114-185, 130 Stat. 538.

¹⁵ *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019) (internal quotations omitted).

¹⁶ See S. Rep. No. 114-4, at 7.

the GSA failed to conduct an adequate search. Accordingly, we request that you direct the GSA to conduct a new search that addresses the omissions outlined herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne L. Weismann". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping tail.

Anne L. Weismann
Chief FOIA Counsel

Encl.