



September 18, 2020

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VIA EMAIL ONLY

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VIA EMAIL ONLY

**RE: FOIA Request for Records Regarding Deletion of Government Records and Property
by Members of the Special Counsel's Office**

Dear Mr. Hibbard:

This letter is a request ("Request") in accordance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

The Request is made by the American Center for Law and Justice ("ACLJ")¹ on behalf of its members. The ACLJ respectfully seeks expedited processing and a waiver of fees related to this Request as set forth in an accompanying memorandum.

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

To summarize, this Request seeks records pertaining to the deletion of government records and property from electronic devices of members of the Special Counsel’s Office (SCO), which is the subject of current and widespread media reporting. This Request also seeks records regarding the guidance and obligations to preserve government records provided to the members of the SCO, and acknowledgment of those obligations, by members of the SCO.

To the best of the Requestor’s knowledge and belief, this Request seeks records of which the following agencies or components would be custodians: The Department of Justice (DOJ), and its components the National Security Division (NSD), the Office of the Attorney General (AG), the Office of the Deputy Attorney General (DAG), the Criminal Division (CD), the Office of Legal Counsel (OLC), the Office of Legal Policy (OLP), the Federal Bureau of Investigations (FBI), the Special Counsel’s Office (SCO), and the Justice Management Division, Departmental Ethics Office.

Given the large number of potentially relevant custodians within the DOJ, and the cross-agency consultation likely to be necessary, the Requestor believes it may be more efficient to submit this FOIA request to DOJ Office of Information Policy and the FOIA/PA Mail Referral Unit to reduce the chance for duplicative efforts in responding to this Request.

Background

Pursuant to DOJ FOIA regulation 28 C.F.R. §16.3(b), this Background addresses “the date, title or name, author, recipient, subject matter of the record[s]” requested, to the extent known.

According to a story, which prompted significant media coverage, “[m]ore than two dozen phones belonging to members of Special Counsel Robert Mueller’s team were wiped clean of data before the Justice Department’s inspector general could comb them for records, the DOJ said in records released Thursday,” September 10, 2020.² Some phones were “reset to factory settings and some wiped “accidentally” after the wrong password was entered too many times, according to 87 pages of DOJ records regarding the phones issued to members of the special counsel’s office. Including mobile phones that were “reassigned,” the Special Counsel’s office wiped a total of 31 phones.”³

As reported by Fox News, “Congressional Republicans demanded answers on Friday as to whether there “was a widespread intentional effort” to wipe the mobile devices of multiple people on former Special Counsel Robert Mueller’s team during the Russia probe, and suggested this could amount to ‘anticipatory obstruction of justice.’”⁴ According to CNN, “Andrew Weissmann, who was the top prosecutor on Mueller’s team, is listed twice on separate dates. One record states: ‘AAW accidentally wiped cell phone -- data lost’: a second states: ‘entered password too many times and wiped his phone.’ . . . Other users whose phones were marked as ‘wiped’ include James

² Mairead McCartle, *At Least 27 Phones from Special Counsel’s Office Were Wiped before DOJ Inspector General Could Review Them*, NATIONAL REVIEW (Sept. 10, 2020), https://www.nationalreview.com/news/at-least-27-phones-from-special-counsels-office-were-wiped-before-doj-inspector-general-could-review-them/?utm_source=recirc-desktop&utm_medium=homepage&utm_campaign=river&utm_content=featured-content-trending&utm_term=first.

³ *Id.*

⁴ <https://www.foxnews.com/politics/republicans-demand-answers-on-muellers-team-wiping-phones>; *see*

Quarles, Rush Atkinson and Greg Andres. (The names of many of those with wiped phones are redacted.)”⁵

The following names were identified as phone custodians on the documents released by DOJ:

1. Robert S. Mueller;
2. Andrew Weissmann;
3. James Quarles;
4. Michael Dreeben;
5. Aaron Zelinsky;
6. Jeannie Rhee;
7. Lisa Page;
8. Peter Strzok;
9. Aaron Zebley;
10. Kyle Freeny;
11. Andres Goldstein;
12. Brandon Van Grack;
13. Beth McGarry;
14. Zaiab Ahmad;
15. Chris Greer;
16. Peter Carr;
17. Elizabeth Prelogar;
18. Adam Jed;
19. Scott Meisler;
20. Greg Andres or Andre (GDA);
21. L. Rush Atkinson;
22. Uzo Asonye;
23. Jessica Romero;
24. Ryan Dicky;
25. Heather Alpino; and,
26. Brian Richardson;

It appears as many as eight (8) additional names were redacted, along with other redacted information.

As the SCO acknowledged, “[a]s an organization within the Department of Justice, the SCO is required to comply with the rules, regulations, procedures, practices, and policies of the Department of Justice.”⁶ According to DOJ regulations:

A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice. He or she shall consult with appropriate offices within the Department for guidance with respect to

⁵ Dan Berman & Veronica Stracqualursi, *Top Senate Republicans pressing for investigation on Mueller team phones being 'wiped,'* CNN (Sept. 12, 2020), <https://www.cnn.com/2020/09/12/politics/senate-doj-mueller-phones/index.html>.

⁶ <https://www.justice.gov/file/1067341/download>.

established practices, policies and procedures of the Department, including ethics and security regulations and procedures. Should the Special Counsel conclude that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated Departmental component inappropriate, he or she may consult directly with the Attorney General. . . . **The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice.** Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.

28 CFR § 600.7 - Conduct and accountability (emphasis added).

According to the SCO's Statement of Expenditures for October 2017 to March 31, 2018, the sum of \$226,730 was expended for Information Technology (IT). The sum of \$54,597 was expended for equipment acquisition. Further, the SCO stated that "Non-capitalized personal property equipment purchased using IC appropriation funds will remain the property of the federal government at the conclusion of the investigation."⁷

Pursuant to 5 C.F.R. §2635.704, entitled "Use of Government property":

(a) Standard. An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

(b) Definitions. For purposes of this section:

(1) Government property includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, Government records, and Government vehicles.⁸

And pursuant to 5 C.F.R. § 2635.101, entitled "Basic obligation of public service," "Employees shall protect and conserve Federal property and shall not use it for other than authorized activities." 5 C.F.R. § 2635.101 (9).

Pursuant to 28 C.F.R. § 45.4, "In using Government property, employees should be mindful of their responsibility to protect and conserve such property and to use official time in an honest effort

⁷ <https://www.justice.gov/file/1067341/download>.

⁸ <https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idno=5#sp5.3.2635.g>.

to perform official duties. *See* 5 CFR 2635.101(b)(9), 2635.704(a), 2635.705(a).” 28 C.F.R. § 45.4(c).

The Federal Records Act, 44 U.S.C. § 3101, requires the preservation of records and copies of official correspondence dealing with the agency’s functions, policies, decisions, and procedures:

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.

44 U.S.C. § 3101. Then, 18 U.S.C. § 2071 makes it a felony when someone “willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys” a government record. And, “Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.” *Id.* at § 2017(b).

Records Requested

For purposes of this Request, the term “record” is “any information” that qualifies under 5 U.S.C. § 552(f), and includes, but is not limited to, the original or any full, complete and unedited copy of any log, chart, list, memorandum, note, correspondence, writing of any kind, policy, procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video, photo, audio recordings, or other material. The term “record” also includes, but is not limited to, all relevant information created, stored, received or delivered in any electronic or digital format, e.g., electronic mail, instant messaging or Facebook Messenger, iMessage, text messages or any other means of communication, and any information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128 (D.C. Cir. July 5, 2016) (rejecting agency argument that emails on a private email account were not under agency control, and holding, “If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.”).

For purposes of this Request, the term “briefing” includes, but is not limited to, any meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person(s).

For purposes of this Request, all sources, documents, letters, reports, briefings, articles and press releases cited in this Request are incorporated by reference as if fully set forth herein.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is May 1, 2017, through the date these Requests are processed.

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests that the FBI respond to the following numbered requests and produce all responsive records:

1. All records of or concerning in any way any document, briefing, material, guidance, advisory, training, acknowledgment or warnings, provided to or received from any person performing any work for or with the Special Counsel's Office, regardless of any title, alias, pseudonym or alternate spelling, abbreviation, or form of identification of such person, regarding in any way the recipients' obligations regarding (1) government records and (2) any phones, computers, electronic devices assigned to, received by, or used by, the recipient.

- a. This Request includes but is not limited to documents bearing the signature or other acknowledgment of consent by the recipient of said obligations.
- b. This Request includes, but is not limited to, any person identified on the document provided to Judicial Watch listing phone custodians, listed above and available here: <https://www.judicialwatch.org/wp-content/uploads/2020/09/JW-v-DOJ-Mueller-Strzok-Page-Texts-02693-pgs-51-54.pdf>, as well as any title, alias, pseudonym or alternate spelling, abbreviation, or form of identification.
- c. This request includes, but is not limited to, communications and discussions between the individuals listed hereinabove.

2. Any and all records of or regarding in any way the wiping, deleting, removing, scrubbing or other such act of removal of the contents of any electronic device assigned to, received by, or used by, any person performing any work for or with the Special Counsel's Office, regardless of any title, alias, pseudonym or alternate spelling, abbreviation, or form of identification of any such person.

- a. This Request includes, but is not limited to, any person identified on the document provided to Judicial Watch listing phone custodians, listed above and available here: <https://www.judicialwatch.org/wp-content/uploads/2020/09/JW-v-DOJ-Mueller-Strzok-Page-Texts-02693-pgs-51-54.pdf>, as well as any title, alias, pseudonym or alternate spelling, abbreviation, or form of identification of any such person.
- b. This request includes, but is not limited to, communications and discussions between the individuals listed hereinabove.

CONCLUSION

If this Request is denied in whole or in part, the ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index.

Moreover, as explained in an accompanying memorandum, the ACLJ is entitled to expedited processing of this Request as well as a waiver of all fees associated with it. The ACLJ reserves the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jordan Sekulow, Executive Director
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice



I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

Respectfully submitted,

A handwritten signature in black ink that reads "Jordan Sekulow".

Jordan Sekulow
Executive Director

A handwritten signature in black ink that reads "Benjamin P. Sisney".

Benjamin P. Sisney
Senior Litigation Counsel