



March 21, 2017

**VIA ELECTRONIC MAIL & ONLINE PORTAL**

Nicole Barksdale-Perry  
Acting Senior Director of FOIA Operations  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, DC 20528-0655  
[foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)

Sabrina Burroughs  
FOIA Officer  
U. S. Customs & Border Protection  
1300 Pennsylvania Avenue NW, Room 3.3D  
Washington, DC 20229  
Online Request at FOIAonline

**Re: Expedited Freedom of Information Act Request**

Dear Ms. Barksdale-Perry and Ms. Burroughs:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and your agency's implementing regulations, 6 C.F.R. Part 5 and 19 C.F.R. § 103.2, American Oversight makes the following request for records.

Building a "wall" along the entire U.S.-Mexico border was a central promise of President Donald Trump's 2016 campaign.<sup>1</sup> On February 8, 2017, Mr. Trump told law enforcement officials that

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<sup>1</sup> Donald J. Trump (@realdonaldtrump), TWITTER (May 20, 2015, 4:22 PM), <https://twitter.com/realDonaldTrump/status/601120861882621955>; Donald J. Trump (@realdonaldtrump), TWITTER (Apr. 1, 2016, 5:49 PM), <https://twitter.com/realDonaldTrump/status/716019755682045952>; see also Amanda Holpuch, *Trump Re-ups Controversial Muslim Ban and Mexico Wall in First Campaign Ad*, THE GUARDIAN, Jan. 4, 2016, <https://www.theguardian.com/us-news/2016/jan/04/donald-trump-great-again-first-campaign-ad-isis-mexico-wall-muslim-ban>; Seema Mehta & Noah Bierman, *Campaign 2016 Updates: Donald Trump Continues Vow to Build Wall and Have Mexico Pay for It*, LOS ANGELES TIMES, Aug. 31, 2016, <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-08312016-htmlstory.html>; Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 8, 2014, 5:26 PM), <https://twitter.com/realDonaldTrump/status/519962130859429888>; Bob



design of the wall was already underway.<sup>2</sup> In prepared remarks for his joint address to Congress on February 28, Mr. Trump indicated that a schedule had been established for starting and completing the wall, and stated, “We will soon begin the construction of a great wall along our southern border. It will be started ahead of schedule and, when finished, it will be a very effective weapon against drugs and crime.”<sup>3</sup> Mr. Trump’s Executive Order instructing the Secretary of Homeland Security to begin construction on the wall cited the Secure Fence Act of 2006 (Pub. L. 109–367) as statutory authority for taking such action.<sup>4</sup> Knowing more about the history of that legislation is highly informative to the scope and bounds of the currently proposed effort.

### **Requested Records**

American Oversight requests that the Department of Homeland Security and its component agencies (collectively “DHS”) produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

All communications concerning the legislation that was ultimately enacted as the Secure Fence Act of 2006 (Pub. L. 109–367) between DHS or its components and Congress, including congressional committees or staff. Please include any communications sent or received by DHS or its components, or communications upon which DHS or its components were copied.

Please provide all responsive records from January 3, 2005, through October 31, 2006.

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,

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Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, WASH. POST, Apr. 5, 2016, [https://www.washingtonpost.com/politics/trump-would-seek-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3\\_story.html?utm\\_term=.7d6d9e7aac34](https://www.washingtonpost.com/politics/trump-would-seek-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html?utm_term=.7d6d9e7aac34).

<sup>2</sup> Julia Edwards Ainsley, *Exclusive - Trump Border ‘Wall’ to Cost \$21.6 Billion, Take 3.5 Years to Build: Internal Report*, REUTERS.COM (Feb. 9, 2017, 10:05 PM), <http://www.reuters.com/article/us-usa-trump-immigration-wall-exclusive-idUSKBN15O2ZN>.

<sup>3</sup> *Donald Trump’s Congress Speech*, CNN.COM (Mar. 1, 2017, 12:54 AM), <http://www.cnn.com/2017/02/28/politics/donald-trump-speech-transcript-full-text/>.

<sup>4</sup> Exec. Order No. 13,767 of Jan. 25, 2017, 82 Fed. Reg. 8,793 (Jan. 30, 2017).

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.<sup>5</sup> **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.**<sup>6</sup>

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.**<sup>7</sup> **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 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**

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<sup>5</sup> 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).

<sup>6</sup> 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)).

<sup>7</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), available at <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), available at <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

**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.”<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.’”<sup>11</sup>

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.<sup>12</sup> 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.

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 15<sup>th</sup> Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release

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<sup>8</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>9</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>10</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>11</sup> *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)).

<sup>12</sup> *Mead Data Central*, 566 F.2d at 261.

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 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.<sup>13</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>14</sup>

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.”<sup>15</sup> The requested records will help American Oversight and the general public understand the progress of this mammoth government project. An agency providing another branch of government with legislative assistance is a particular activity through which the executive branch shares its expertise. This records request would reveal the type of information Congress believed to be useful in crafting as the Secure Fence Act of 2006 (Pub. L. 109-367) and the type of information DHS identified as relevant for its co-equal branch to consider; all of this information would meaningfully inform and significantly enhance the public’s understanding of the priorities, opportunities, and challenges in constructing 1,250 miles of border barrier.

This request is primarily and fundamentally for non-commercial purposes.<sup>16</sup> 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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website.

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 6 C.F.R. § 5.5(e), American Oversight requests that DHS expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions about the government’s integrity,

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<sup>13</sup> 6 C.F.R. § 5.11(k)(1)(i).

<sup>14</sup> 6 C.F.R. § 5.11(k)(1)(ii).

<sup>15</sup> 6 C.F.R. § 5.11(k)(1)(i); 6 C.F.R. § 5.11(k)(2)(i)-(iv).

<sup>16</sup> 6 C.F.R. § 5.11(k)(1)(ii); 6 C.F.R. § 5.11(k)(3)(i)-(ii).

which affect public confidence. Media reports indicate funding for the wall could begin to be appropriated as soon as next month.<sup>17</sup> Despite not having secured funding, DHS has already issued its request for proposals, with responses due less than two weeks later.<sup>18</sup> News stories about the wall are published on a daily basis.<sup>19</sup> A multi-billion-dollar construction project directed and financed by the federal government using tax dollars on an accelerated timeline is a quintessential example of “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”<sup>20</sup>

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 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

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<sup>17</sup> Manu Raju et al., *Trump Asking Congress, not Mexico, to Pay for Border Wall*, CNN.COM (Jan. 6, 2017, 2:11 PM), <http://www.cnn.com/2017/01/05/politics/border-wall-house-republicans-donald-trump-taxpayers/>.

<sup>18</sup> FED. BUS. OPPORTUNITIES, Solicitation No. 2017-JC-RT-0001, [https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=dd3bb84fde638f0add2d1bf6560da6b5&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=dd3bb84fde638f0add2d1bf6560da6b5&_cview=1) (last visited Mar. 20, 2017). See, e.g., Dan Frosch, *Bidding Process for U.S. Border-Wall Construction Begins*, WALL ST. J., Mar. 18, 2017, <https://www.wsj.com/articles/bidding-process-for-u-s-border-wall-construction-begins-1489869241>; accord Kriston Capps, *Almost 200 Firms Have Bid to Build Trump’s Border Wall*, GOV’T EXEC., Feb. 28, 2017, <http://www.govexec.com/contracting/2017/02/almost-200-firms-have-bid-build-trumps-border-wall/135754/> (“The extreme haste of the government’s procurement process is matched only by the breakneck speed with which the government plans to build the wall.”).

<sup>19</sup> See, e.g., Associated Press, *Trump Wants to Build 30-foot-high Wall at Mexican Border*, CNBC (Mar. 19, 2017, 6:22 AM), <http://www.cnbc.com/2017/03/19/trump-wants-to-build-30-foot-high-wall-at-mexican-border.html>; Associated Press, *Mexico: Companies Should Examine Consciences on Border Wall*, WASH. POST, Mar. 17, 2017, [https://www.washingtonpost.com/business/mexico-companies-should-examine-consciences-on-border-wall/2017/03/17/7b44efbe-0b84-11e7-bd19-fd3afa0f7e2a\\_story.html?utm\\_term=.3856c7740956](https://www.washingtonpost.com/business/mexico-companies-should-examine-consciences-on-border-wall/2017/03/17/7b44efbe-0b84-11e7-bd19-fd3afa0f7e2a_story.html?utm_term=.3856c7740956); Kriston Capps, *The Firm that Built the Border Fence Isn’t Interested in the Border Wall*, GOV’T EXEC., Mar. 10, 2017, <http://m.govexec.com/contracting/2017/03/firm-built-border-fence-isnt-interested-border-wall/136060/?oref=m-ge-river>; Kriston Capps, *Trump’s Border Wall Won’t Be a Wall*, GOV’T EXEC., Mar. 16, 2017, <http://m.govexec.com/contracting/2017/03/trumps-border-wall-wont-be-wall/136211/?oref=m-ge-river>; Melissa del Bosque, *Texas Receive First Notices of Land Condemnation for Trump’s Border Wall*, TEXAS OBSERVER, Mar. 14, 2017, <https://www.texasobserver.org/texas-border-wall-mexico-condemnation-letter/>; Frosch, *supra* note 18; T. Christian Miller, *The First Brick in the Wall: Trump’s Promised Mexican Border Is Starting to Turn Into Reality*, SALON (Mar. 20, 2017, 8:00 AM), [http://www.salon.com/2017/03/20/the-first-brick-in-the-wall-trumps-promised-mexican-border-is-starting-to-turn-into-reality\\_partner/](http://www.salon.com/2017/03/20/the-first-brick-in-the-wall-trumps-promised-mexican-border-is-starting-to-turn-into-reality_partner/).

<sup>20</sup> 6 C.F.R. § 5.5(e)(1)(iv).

Cerissa Cafasso at [foia@americanoversight.org](mailto: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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight