



May 3, 2017

**VIA ELECTRONIC MAIL**

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)

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

Dear Ms. Barksdale-Perry:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* 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.

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*, L.A. 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 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-look-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-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html?utm_term=.7d6d9e7aac34).



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> Despite repeatedly pledging that he would make Mexico pay for the wall, it appears American taxpayers will be footing the bill for the construction.<sup>4</sup> Moreover, Mr. Trump has evidenced a lack of familiarity with U.S. procurement laws as well as a propensity for inside deals with his friends in the construction industry.<sup>5</sup> Mr. Trump has insisted that he will be personally involved in the wall’s “design and negotiations” to ensure it comes in under budget.<sup>6</sup>

During Congress’s discussions to extend federal funding beyond April 28, media reports indicated that OMB Director Mick Mulvaney has made funding for the wall “a top demand” since the massive infrastructure project is “one of [Mr. Trump’s] highest priorities.”<sup>7</sup> In response to reports of conflicts between Congress and the Trump administration over funding the wall in this manner,<sup>8</sup> Mr. Mulvaney said in a televised interview, “It should surprise no one, in fact I know it doesn’t

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<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> Stuart Anderson, *Now Americans, Not Mexico, Would Pay for the Wall?*, FORBES.COM (Jan. 26, 2017, 9:04 PM), <https://www.forbes.com/sites/stuartanderson/2017/01/26/now-americans-not-mexico-would-pay-for-the-wall/#177fa9126c48>; Scott Horsley, *Trump’s Suggested Import Tax Would Mean Americans Pay for That Wall*, NPR, Jan. 26, 2017, <http://www.npr.org/2017/01/26/511861462/trumps-suggested-import-tax-would-mean-americans-pay-for-that-wall>.

<sup>5</sup> Blake Schmidt & Jonathan Levin, *Miami Billionaire Perez Rejects His Friend Trump’s Wall Overture*, BLOOMBERG, Jan. 31, 2017, <https://www.bloomberg.com/news/articles/2017-01-31/miami-billionaire-perez-rejects-his-friend-trump-s-wall-overture> (“[Jorge] Perez, a billionaire who has built Trump-branded towers in South Florida, said the president e-mailed him after the inauguration with plans for the wall and asked if he’d be interested in working on it.”).

<sup>6</sup> Donald J. Trump (@realdonaldtrump), TWITTER (Feb. 11, 2017, 9:18 AM), <https://twitter.com/realdonaldtrump/status/830405706255912960>; Donald J. Trump (@realdonaldtrump), TWITTER (Feb. 11, 2017, 9:24 AM), <https://twitter.com/realdonaldtrump/status/830407172747988992>.

<sup>7</sup> Andrew Taylor, *President Trump’s Budget Chief Says Spending Bill Must Have Border Wall Funding*, TIME, Apr. 20, 2017, <http://time.com/4749678/mick-mulvaney-budget-border-wall-funding-government-shutdown/>.

<sup>8</sup> Jim Acosta & Theodore Schleifer, *Mulvaney Says No Shutdown, Even with Border Ask*, CNN (Apr. 21, 2017, 2:26 PM), <http://www.cnn.com/2017/04/21/politics/mick-mulvaney-border-wall/>; Richard Cowan & David Morgan, *Trump Republicans Face Tricky Task of Averting U.S. Government Shutdown*, REUTERS (Apr. 21, 2017, 9:12 AM), <http://www.reuters.com/article/us-usa-budget-idUSKBN17N1LK>; Jennifer Jacobs, *White House Orders Agencies Prepare for Potential Government Shutdown*, BLOOMBERG (Apr. 21, 2017, 1:01 PM), <https://www.bloomberg.com/politics/articles/2017-04-21/trump-confident-government-to-avoid-shutdown-as-agencies-prepare>.

surprise anyone that the actual, physical southern wall is a priority, a top priority for this president. He ran on it. He won on it. And as every winning candidate always like to say, ‘Elections have consequences.’”<sup>9</sup>

On Friday, April 28, Congress passed a one-week funding bill to keep the government open through Friday, May 5.<sup>10</sup> On Sunday, April 30, news emerged that Congress had come to agreement on a spending bill—the Consolidated Appropriations Act, 2017—through the end of Fiscal Year (FY) 2017 that would explicitly prohibit use of appropriated funds for wall construction.<sup>11</sup> On May 1, Mr. Mulvaney restated the administration’s commitment to building a wall and seeking funding in FY 2018 for “bricks and mortar” for the wall.<sup>12</sup>

In contrast to the White House’s assurances that the project will be a physical wall, in recent testimony Homeland Security Secretary John Kelly testified that a contiguous, physical wall was unlikely.<sup>13</sup> In addition, the total cost of the wall is still unknown, though reports range from \$8 billion<sup>14</sup> to \$22 billion<sup>15</sup> to \$70 billion.<sup>16</sup> Nevertheless, as the administration’s designated budget official, Mr. Mulvaney is in negotiations with the Hill for significant budget allocations for the wall in this spending bill. As he notes, “[Y]ou cannot expect a president who just won election to give up very easily on his highest priority.”<sup>17</sup> In short, the administration was threatening a government shutdown if it did not receive funds to build a wall, and Mr. Trump reiterated that threat after the

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<sup>9</sup> *OMB Director Says No Surprise Wall Is Top Trump Priority*, BLOOMBERG (Apr. 21, 2017, 2:57 PM), <https://www.bloomberg.com/politics/videos/2017-04-21/omb-dir-says-no-surprise-wall-is-trump-priority-video>.

<sup>10</sup> Erin Kelly, *Congress Passes Short-Term Funding Bill to Avoid Government Shutdown*, USA TODAY (Apr. 28, 2017, 1:34 PM), <https://www.usatoday.com/story/news/politics/2017/04/28/house-passes-short-term-funding-bill-avoid-shutdown-senate-expected-follow-suit/101018580/>.

<sup>11</sup> Thomas Kaplan & Matt Flegenheimer, *Bipartisan Agreement Reached to Fund Government Through September*, N.Y. TIMES, Apr. 30, 2017, <https://www.nytimes.com/2017/04/30/us/politics/bipartisan-agreement-reached-to-fund-government-through-september.html>; Lisa Mascaro, *Congressional Negotiators Reach \$1-Trillion Deal to Fund Government but Provide Little for Trump’s Priorities*, L.A. TIMES, Apr. 30, 2017, <http://www.latimes.com/politics/la-na-pol-congress-budget-deal-20170430-story.html>.

<sup>12</sup> *Press Briefing by Office of Management and Budget Director Mick Mulvaney on the Consolidated Appropriations Act, 2017*, THE WHITE HOUSE, May 1, 2017, <https://www.whitehouse.gov/the-press-office/2017/05/01/press-briefing-office-management-and-budget-director-mick-mulvaney>.

<sup>13</sup> Kal Toipan, *Kelly: No Border Wall ‘from Sea to Shining Sea’*, CNN (Apr. 5, 2017, 11:56 AM), <http://www.cnn.com/2017/04/05/politics/kelly-testimony-senate-homeland-border-security-wall/>.

<sup>14</sup> Jeremy Diamond, *Trump: Border Wall Will Cost \$8 Billion*, CNN (Feb. 9, 2017, 4:27 PM), <http://www.cnn.com/2016/02/09/politics/donald-trump-border-wall-cost-8-billion/>.

<sup>15</sup> Ainsley, *supra* note 2.

<sup>16</sup> Ron Nixon, *Border Wall Cost 3 Times Estimates, Senate Democrats’ Report Says*, N.Y. TIMES, Apr. 18, 2017, <https://www.nytimes.com/2017/04/18/us/politics/senate-democrats-border-wall-cost-trump.html>.

<sup>17</sup> BLOOMBERG, *supra* note 9.

new deal was reached,<sup>18</sup> notwithstanding the fact that, as of yet, there is no plan or serious budget estimate for the wall, much less a consensus on what form such a “wall” would take or even that it is necessary.

The continuing debate over funding for the “wall,” including what funds Congress has made available in connection with planning for a construction of such a “wall,” remains an issue of high public interest.

### **Requested Records**

American Oversight requests that DHS produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All guidance from the Chief Financial Officer or Office of General Counsel regarding the availability of appropriated funds or how to use appropriated funds for construction of a wall, fence, or other physical or virtual barrier along the U.S.-Mexico border in compliance with any riders in the Consolidated Appropriations Act, 2017.
2. All communications with Congress, including any member of Congress or congressional staff, regarding the inclusion of funding for construction of a wall, fence, or other physical or virtual barrier along the U.S.-Mexico in any congressional resolutions or bills.

The search for responsive records should include individuals and locations where records are likely to exist, including but not limited to: John Kelly, the Office of the Secretary, the Chief of Staff, Elaine Duke, the Office of the Deputy Secretary, the Office of Policy, the Office of Legislative Affairs, and the Management Directorate.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

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

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<sup>18</sup> Julie Hirschfeld Davis, *Trump, in Wake of Deal to Avoid a Shutdown Now, Calls for One Later*, N.Y. TIMES, May, 2, 2017, <https://www.nytimes.com/2017/05/02/us/politics/good-shutdown-congress-trump.html>.

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>19</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>20</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>21</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 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.**

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<sup>19</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>20</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>21</sup> 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>.

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>22</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>23</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>24</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>25</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>26</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 of responsive records to American Oversight, please also provide responsive material on rolling basis.

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<sup>22</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>23</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

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

<sup>25</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>26</sup> *Mead Data Central*, 566 F.2d at 261.



## 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>27</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>28</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>29</sup> The requested records will help American Oversight and the general public understand the progress of this mammoth government project. A massive infrastructure project and negotiations with Congress regarding appropriations to undertake such a project are clear government activities. Considering Mr. Trump has promised that Mexico would pay for the wall<sup>30</sup> and with nothing less than the continuing operations of the federal government on the line,<sup>31</sup> the requested records would inform the public as to the status of the wall project and the spending priorities of the administration.

This request is primarily and fundamentally for non-commercial purposes.<sup>32</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 and promote their availability on social media platforms, such as Facebook and Twitter.<sup>33</sup> 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.<sup>34</sup>

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<sup>27</sup> 6 C.F.R. § 5.11(k)(1)(i).

<sup>28</sup> 6 C.F.R. § 5.11(k)(1)(ii).

<sup>29</sup> 6 C.F.R. § 5.11(k)(1)(i), (2)(i)-(iv).

<sup>30</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>31</sup> Deirdre Walsh & Ted Barrett, *Government Shutdown: What We Know So Far*, CNN (Apr. 20, 2017, 6:07 AM), <http://www.cnn.com/2017/04/20/politics/government-shutdown-latest/>.

<sup>32</sup> 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

<sup>33</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 3, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 3, 2017).

<sup>34</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 6 C.F.R. § 5.5(e)(1)(ii), (iv), 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 an urgency to inform the public about the actual or alleged federal government activity that is the subject of this request. The wall is a significant factor in budget negotiations and how much is allocated for border security.<sup>35</sup> Furthermore, this lack of funding for the wall in appropriations for the balance of FY 2017 has been explicitly and frequently referenced in the news coverage.<sup>36</sup> Mr. Mulvaney has told reporters that despite the lack of current funding, the president will be asking Congress for appropriations for the wall—“a top priority of the president”—later this month in the FY 2018 budget request.<sup>37</sup>

Despite bullish statements from the White House on wall construction, Mr. Mulvaney has acknowledged that there are still many open questions with regard to the wall—including funding, total cost, and what the “wall” will actually be. In a March press briefing, Mr. Mulvaney was asked if the \$1.5 billion requested for the wall in this budget was a “first step,” to which Mr. Mulvaney responded:

Yeah, it's all that we think that we can spend this year. We haven't settled on a -- and the next question is going to be, how many miles of wall does that build, right? And we don't know the answer to that question because we haven't settled on construction types. We haven't settled on where we're going to start. I think the funding provides for a couple of different pilot cases. I don't know what else to describe them -- as different kinds of barriers in different kinds of places, as we try and find the most cost-efficient, the safest, and also the most effective border protections. They may be different in different areas.

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<sup>35</sup> Acosta & Schleifer, *supra* note 8; Cowan & Morgan; *supra* note 8; Jacobs, *supra* note 8; Taylor, *supra* note 7.

<sup>36</sup> Scott Detrow, *Congress Reaches Deal to Fund Government Through September*, NPR (May 1, 2017, 9:45 AM), <http://www.npr.org/sections/thetwo-way/2017/04/30/526326186/congress-reaches-deal-to-fund-government-through-september>; Billy House et al., *Trump Says He'll Sign Congress Spending Deal That Jettisons His Goals*, BLOOMBERGPOLITICS (May 1, 2017, 1:50 PM), <https://www.bloomberg.com/politics/articles/2017-05-01/congress-strikes-tentative-deal-on-1-1-trillion-spending-bill>; Kaplan & Flegenheimer, *supra* note 3; Lisa Mascaro, *Congressional Negotiators Reach \$1-Trillion Deal to Fund Government but Provide Little for Trump's Priorities*, L.A. TIMES, Apr. 30, 2017, <http://www.latimes.com/politics/la-na-pol-congress-budget-deal-20170430-story.html>.

<sup>37</sup> Reuters, *Trump Will Seek Border Wall Funds in Fiscal 2018 Budget Request, Mulvaney Says*, CNBC.com, May 1, 2017, <http://www.cnbc.com/2017/05/01/trump-will-seek-border-wall-funds-in-fiscal-2018-budget-request-mulvaney-says.html>.



So the \$1.5 billion allows us to start that program. We come along with additional funding -- \$2.6 [billion] in 2018 -- and obviously when we get to that fuller budget -- the “fuller budget,” that’s not a very good word -- when we get to the full budget in May, you’ll also start seeing some projections out in throughout the 10-year window.<sup>38</sup>

By Mr. Mulvaney’s statement, the administration is presently assessing the total cost of the wall with reports due out in the coming weeks. In light of Mr. Mulvaney’s comments regarding Mr. Trump not “giv[ing] up very easily on his highest priority,”<sup>39</sup> Mr. Trump’s statements over the weekend to not “even worry about it” because “we’re going to have the wall,”<sup>40</sup> and the fact that DHS is continuing to move forward with developing prototypes,<sup>41</sup> a distinct urgency remains to inform the public about the administration’s analysis of available funding for the wall.

Moreover, I certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,<sup>42</sup> American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”<sup>43</sup> American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight will also make materials it gathers available on its website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>44</sup> For example, this FOIA request is part of American Oversight’s “Audit the Wall” effort, a demonstrable campaign dedicated to the public disclosure of documents and creation of editorial content.<sup>45</sup>

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<sup>38</sup> *Press Briefing by OMB Director Mick Mulvaney Previewing the President’s FY18 Budget*, THE WHITE HOUSE, Mar. 15, 2017, <https://www.whitehouse.gov/the-press-office/2017/03/16/press-briefing-omb-director-mick-mulvaney-previewing-presidents-fy18>.

<sup>39</sup> *OMB Director Says No Surprise Wall Is Top Trump Priority*, BLOOMBERG (Apr. 21, 2017, 2:57 PM), <https://www.bloomberg.com/politics/videos/2017-04-21/omb-dir-says-no-surprise-wall-is-trump-priority-video>.

<sup>40</sup> March Fisher, *Trump Invigorates, Enchants Crowd During Rally in Harrisburg, Pa.*, WASH. POST, Apr. 29, 2017, [https://www.washingtonpost.com/politics/100-days-in-trump-invigorates-enchants-crowd-during-rally-in-harrisburg-pa/2017/04/29/c656d764-2aa7-11e7-a616-d7c8a68c1a66\\_story.html?utm\\_term=.b5bb64763297](https://www.washingtonpost.com/politics/100-days-in-trump-invigorates-enchants-crowd-during-rally-in-harrisburg-pa/2017/04/29/c656d764-2aa7-11e7-a616-d7c8a68c1a66_story.html?utm_term=.b5bb64763297).

<sup>41</sup> Mark Hensch, *DHS Head: Border Wall Will ‘Move Forward’ This Summer*, THE HILL (Apr. 21, 2017, 8:21 AM), <http://thehill.com/homenews/administration/329848-dhs-head-border-wall-to-move-forward-in-summer>.

<sup>42</sup> See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>43</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>44</sup> See *supra* note 33.

<sup>45</sup> See *supra* note 34.

I further 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, which affect public confidence. News stories about the wall and its role in the budget fight are published regularly.<sup>46</sup> Despite not having secured funding, the Department of Homeland Security has already issued multiple requests for proposals related to the wall.<sup>47</sup> The administration has been described as moving with "extreme haste" on the procurement process.<sup>48</sup> U.S. Customs and Border Protection has said that winning contractors selected to build wall prototypes will be selected by June 1.<sup>49</sup> Secretary of Homeland Security John F. Kelly has previously committed to completing the wall by 2019.<sup>50</sup>

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<sup>46</sup> See, e.g., Acosta & Schleifer, *supra* note 8; Editorial Board, *Up Against the Wall*, N.Y. TIMES, Apr. 8, 2017, <https://www.nytimes.com/2017/04/08/opinion/up-against-the-wall.html>; Fox & Friends, *Bids to Build President Trump's Border Wall Due Today*, FOXNEWS INSIDER (Apr. 4, 2017, 7:59 AM), <http://insider.foxnews.com/2017/04/04/mexico-border-wall-bids-due-today-president-trump-illegal-immigration-policy>; T. Christian Miller, *Trump's Wall: How Much Money Does the Government Have for It Now?*, PROPUBLICA (Apr. 13, 2017, 1:34 PM), <https://www.propublica.org/article/trumps-wall-how-much-money-does-the-government-have-for-it-now>; Phillip Molnar & Lyndsay Winkley, *Trump's Border Wall Will Get Its Start in San Diego County*, L.A. TIMES, Apr. 10, 2017, <http://www.latimes.com/local/lanow/la-me-san-diego-border-wall-20170410-story.html>; Nixon, *supra* note 13; Nicki Rossoll, *Despite Trump Campaign Promise, Tillerson Had 'No Conversation' with Mexico Paying for Border Wall*, ABC NEWS (Apr. 9, 2017, 9:01 AM), <http://abcnews.go.com/Politics/trump-campaign-promise-tillerson-conversation-mexico-paying-border/story?id=46685291>; Taylor, *supra* note 7; Alex Veiga, *Who Would Gain from Trump's Border Wall?*, DETROIT NEWS, Apr. 1, 2017, <http://www.detroitnews.com/story/news/nation/2017/04/01/border-wall-trump/99907624/>.

<sup>47</sup> FED. BUS. OPPORTUNITIES, Solicitation No. 2017-JC-RT-0001, <https://www.fbo.gov/index?id=f61a85538f383ec3ed9cac3c9e21d6f1> (last visited Apr. 21, 2017); FED. BUS. OPPORTUNITIES, Solicitation No. HSBP1017R0022, [https://www.fbo.gov/index?s=opportunity&mode=form&id=6d883f07a72d10347a0304089f00f1eb&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=6d883f07a72d10347a0304089f00f1eb&tab=core&_cview=1) (last visited Apr. 21, 2017); FED. BUS. OPPORTUNITIES, Solicitation No. HSBP1017R0023, [https://www.fbo.gov/index?s=opportunity&mode=form&id=5eb4c7553ad9aeb62ad3ecf7f216ef3c&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=5eb4c7553ad9aeb62ad3ecf7f216ef3c&tab=core&_cview=1) (last visited Apr. 21, 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>; Margaret Hartmann, *Trump's 'Big, Beautiful' Border Wall Threatened by Political Reality*, NEW YORK (Mar. 10, 2017, 4:34 AM), <http://nymag.com/daily/intelligencer/2017/03/trumps-border-wall-threatened-by-political-reality.html>.

<sup>48</sup> 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>49</sup> Elliot Spagat, *Border Wall Contractors Brace for Hostile Environment*, ASSOCIATED PRESS, Apr. 4, 2017, <https://apnews.com/0ebfb4522e734425b5e1ff60998da158/Border-wall-contractors-brace-for-hostile-environment>.

<sup>50</sup> Madeline Conway, *Kelly: I Hope Border Wall Will Be 'Done Within the Next Two Years'*, POLITICO (Feb. 2, 2017, 12:16 PM), <http://www.politico.com/story/2017/02/john-kelly-border-wall>.

Despite the Consolidated Appropriations Act’s prohibition on use of funding for construction of the wall, the White House doubled down on its intent to move forward with wall construction. White House Press Secretary Sean Spicer tweeted a quote attributed to Mr. Trump: “we are beginning to build the wall, and we will keep out the gang members, criminals & the drug and human traffickers.”<sup>51</sup> Three hours later, Mr. Spicer posted a tweet stating that Mr. Trump “just negotiated a spending deal where we can build these,” and then posted three pictures of Bollard type fencing.<sup>52</sup>

A multi-billion-dollar construction project directed and financed by the federal government using tax dollars—which it may not have the authority to spend—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>53</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 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,



Austin R. Evers  
Executive Director  
American Oversight

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[fox-interview-234543](#); Adam K. Raymond, *DHS Head John Kelly Says He Only Needs Two Years to Build That Wall*, NEW YORK (Feb. 2, 2017, 4:55 PM), <http://nymag.com/daily/intelligencer/2017/02/john-kelly-says-he-only-needs-two-years-to-build-that-wall.html>.

<sup>51</sup> Sean Spicer (@PressSec), TWITTER (May 2, 2017, 12:04 PM), <https://twitter.com/PressSec/status/859438446573649920>.

<sup>52</sup> Sean Spicer (@PressSec), TWITTER (May 2, 2017, 3:00 PM), <https://twitter.com/PressSec/status/859482700310294528>.

<sup>53</sup> 6 C.F.R. § 5.5(e)(1)(iv).