



March 29, 2017

VIA ELECTRONIC MAIL & ONLINE PORTAL

Kevin Krebs
Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
600 E Street NW, Room 7300
Washington, DC 20530-0001
Online Request at FOIAonline

Charles Smirollo
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Law and Policy Section
Environment and Natural Resources Division
P.O. Box 7415, Ben Franklin Station
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FOIARouting.ENRD@usdoj.gov

Re: Expedited Freedom of Information Act Request

Dear Messrs. Krebs and Smirollo:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, 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.¹ On February 8, 2017, Mr. Trump told law enforcement officials that

¹ 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



design of the wall was already underway.² 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.”³

What has not been addressed in the president’s statements is how the wall will take into account the Tohono O’odham Nation, the Native American tribe that has lived for centuries on the land through which the U.S.-Mexico border now runs.⁴ The United States has an obligation to consult with tribal governments on this project,⁵ and the public is entitled to know how the administration is ensuring indigenous voices are heard.

Requested Records

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

1. All communications, correspondence, meeting notices, meeting agendas, informational materials, talking points, or other materials exchanged between or used in discussions with the Tohono O’odham Nation, including but not limited to any lobbyist, lawyer, or other representative contacting DOJ on the tribe’s behalf, and DOJ.

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.

² 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>.

³ *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/>.

⁴ Samantha Schmidt, *A 75-mile-wide Gap in Trump’s Wall? A Tribe Says It Won’t Let It Divide Its Land*, WASH. POST, Nov. 15, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/a-75-mile-wide-gap-in-trumps-wall-a-tribe-says-it-wont-let-the-wall-divide-its-land/?utm_term=.f93210ba566a.

⁵ See U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., BLM MANUAL 1780 TRIBAL RELATIONS, *Ch. 1.3 - Introduction, Authority* (Dec. 15, 2016), <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf> (citing (1) “treaties between tribes and the United States,” (2) nineteen statutes, (3) twenty-two regulations, (4) eight Executive Orders / Presidential Memoranda, (5) eight Orders from the Secretary of the Interior, and (6) three Departmental Manuals as legal support for the “government-to-government consultation process”); U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., *Tribal Consultation*, <https://www.blm.gov/services/tribal-consultation> (last visited Mar. 28, 2017).

2. All communications, email, correspondence, meeting notices, meeting agendas, informational materials, talking points, or other materials exchanged between the Department of Homeland Security, including any of its component agencies, and DOJ regarding the Tohono O’odham Nation.

Please provide all responsive records from November 8, 2016, through 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 DOJ 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 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.⁶ **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.**⁷

⁶ 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).

⁷ 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)).

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 DOJ’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.**⁸ 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 DOJ’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ 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.**

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.”⁹ 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.”¹⁰ 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.”¹¹ 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.’”¹²

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

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹¹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹² *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)).

document.¹³ 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, DOJ 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 DOJ 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 15th 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.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(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.¹⁴ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁵

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.”¹⁶ The land of the Tohono O’odham has previously been at the center of wall-construction conversations, both as it relates to respecting tribal land and to securing the U.S. border across sovereign territory.¹⁷ The requested records will meaningfully inform the public’s

¹³ *Mead Data Central*, 566 F.2d at 261.

¹⁴ 28 C.F.R. § 16.10(k)(1).

¹⁵ *Id.*

¹⁶ 28 C.F.R. § 16.10(k)(1); 28 C.F.R. § 16.10(k)(2)(i)-(ii).

¹⁷ Tim Gaynor, *Indians Complain Graves Dug up for Border Fence*, REUTERS, June 24, 2007, <http://www.reuters.com/article/us-security-usa-indians-idUSN2216828020070624>; Kate Kilpatrick, *U.S.-Mexico Border Wreaks Havoc on Lives of an Indigenous Desert Tribe*, ALJAZEERA AMERICA (May 25, 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/5/25/us-mexico-borderwreakshavocwithlivesofanindigenousdesertpeople.html>; Tim Murphy, *Tribe Says Border Fence Restricts Sacred Rites*, USA TODAY, July 15, 2008, http://usatoday30.usatoday.com/news/religion/2008-07-15-tribe-border_N.htm; Byron Pitts & Dan

understanding of the consultation that is occurring for the current border project, a subject that is of significant interest not only to the 30,000 members of the Tohono O’odham Nation but also to the American public as a whole.¹⁸

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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.²⁰ 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.²¹

Accordingly, American Oversight qualifies for a fee waiver.

Lieberman, *In Efforts to Secure U.S.-Mexico Border, Ariz. Native Americans Feel Caught in the Middle*, ABC NEWS, June 27, 2013, <http://abcnews.go.com/US/efforts-secure-us-mexico-border-ariz-native-americans/story?id=19496394>.

¹⁸ Associated Press, *Tribu de Arizona Protesta Contra Muro Fronterizo de Trump*, HOUS. CHRON., Mar. 23, 2017, <http://www.chron.com/espanol/news/article/Tribu-de-Arizona-protesta-contra-muro-fronterizo-11023393.php>; Carolyn Dryer, *Tohono O’odham Nation Border with Mexico Most Important Issue*, GLENDALE STAR, Mar. 16, 2017, http://www.glendalestar.com/news/article_338996c2-083f-11e7-93fe-1f20ca5e7391.html; Carrie Jung, *Tohono O’odham Nation Tribal Leaders Say Wall with Mexico Will Not Be Built on Their Land*, KJZZ 91.5 (NOV. 14, 2016, 6:46 PM), <http://kjzz.org/content/394973/tohono-oodham-nation-tribal-leaders-say-wall-mexico-will-not-be-built-their-land>; Dianna M. Nández, *Tohono O’odham Tribal Members Opposing Trump’s Border Wall Take Fight to McCain*, ARIZ. REPUBLIC, Mar. 23, 2017, <http://www.azcentral.com/story/news/politics/border-issues/2017/03/23/tohono-oodham-trump-border-wall/99550594/>; Jacelle Ramon-Sauberan, *Trump’s Border Wall Builds Apprehension Across Tohono O’odham Nation*, INDIAN COUNTRY MEDIA NETWORK, Feb. 9, 2017, <https://indiancountrymedianetwork.com/news/politics/trumps-border-wall-builds-apprehension-across-tohono-oodham-nation/>; Fernanda Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, N.Y. TIMES, Feb. 20, 2017, <https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html>.

¹⁹ 28 C.F.R. § 16.10(k)(1); 28 C.F.R. § 16.10(k)(2)(iii).

²⁰ American Oversight currently has over 9,600 followers on Facebook, and over 7,200 on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 28, 2017); American Oversight (@weareoversight), TWITTER (last visited Mar. 28, 2017).

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org (last visited Mar. 27, 2017).

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), American Oversight requests that DOJ 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, which affect public confidence. Media reports indicate funding for the wall could begin to be appropriated as soon as next month.²² Despite not having secured funding, the Department of Homeland Security has already issued its request for proposals with responses due today, less than two weeks after the RFP was released.²³ News stories about the wall are published on a daily basis,²⁴ and the opposition of the Tohono O'odham to Mr. Trump's wall has been extensively covered in the media.²⁵ A multi-billion-dollar construction project directed and financed by the federal

²² 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/>.

²³ FED. BUS. OPPORTUNITIES, Solicitation No. 2017-JC-RT-0001, 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.”).

²⁴ 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; 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, *Texans 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 23; 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/.

²⁵ Associated Press, *supra* note 18; Whitney Clark, *Indivisible Tohono Holds Gathering Outside of Senator McCain's Office*, KGUN9 (Mar. 24, 2017, 10:30 AM), <http://www.kgun9.com/news/local-news/indivisible-tohono-holds-gathering-outside-of-senator-mccains-office>; Dryer, *supra* note 18;

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.”²⁶

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 DOJ 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 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

cc: Sarah Isgur Flores, Director, Office of Public Affairs

Jung, *supra* note 18; Nández, *supra* note 18; Ramon-Sauberan, *supra* note 18; Santos, *supra* note 18; Schmidt, *supra* note 4.

²⁶ 28 C.F.R. § 16.5(e)(1)(iv).