



January 24, 2019

VIA ELECTRONIC MAIL

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655
foia@hq.dhs.gov

Re: Freedom of Information Act Request

Dear Mr. Kaplan:

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

On December 10, 2018, the American Border Foundation published a blog post highlighting their most recent efforts to transfer funds raised through their FundTheWall project to DHS.¹ The blog describes multiple efforts dating back to December 2017 to explore delivering money to DHS, including communications with DHS regarding forms required to specify the nature of the donation,² as well as communications seeking approval of the Office of General Counsel for delivery of the funds.³ A separate post reports an affirmative agreement by DHS to receive American Border Foundation donations as of September 2018.⁴

American Oversight requests records to shed light on the role of private citizens donating funds for use in the construction of the controversial border wall.

Requested Records

American Oversight requests that DHS produce the following within twenty business days:

¹ *American Border Foundation Continues to Push for Delivery to DHS*, FUND THE WALL, Dec. 10, 2018, <https://www.fundthewall.com/abf-continue-to-push-for-delivery-to-dhs/>.

² *Id.*

³ *Cutting the Red Tape at DHS*, FUND THE WALL, Aug. 19, 2018, <https://www.fundthewall.com/dhs/>.

⁴ *How the Logistics Work*, FUND THE WALL, Nov. 13, 2018, <https://www.fundthewall.com/how-the-logistics-work/>.



1. All records reflecting communications (including letters, memoranda, electronic mail and attachments, calendar invitations or entries, and handwritten or electronic notes from meetings) between any DHS official and any representative or affiliate of American Border Foundation or Fund the Wall, including but not limited to those individuals specified below:
 - i. Anyone with an email address ending in @fundthewall.com or @sheriffswall.org;
 - ii. Quentin Kramer, including the email address qkramer@fundthewall.com;
 - iii. Ryan Bosi;
 - iv. Kristen Keenan;
 - v. Gary Dolan;
 - vi. Kenn Inwood;
 - vii. Jon Brimus;
 - viii. Jeremy Messina; and
 - ix. Anyone with an email address ending in @fairmountcharles.com.
2. All records reflecting communications (including letters, memoranda, electronic mail and attachments, calendar invitations or entries, and handwritten or electronic notes from meetings) between any DHS official and any of the following organizations or individuals regarding funding for the construction of a wall, fence, or other barrier along the U.S.-Mexico border, law enforcement on the U.S.-Mexico border, and immigration policy:
 - i. Thomas Hodgson; and
 - ii. Anyone representing National Sheriffs' Association or National Sheriffs' Educational Foundation, or with an email address ending in @sheriffs.org.
3. To the extent not otherwise responsive to requests 1 or 2, all records reflecting any agreement or contract between the U.S. Government and the American Border Foundation, Fund the Wall, the National Sheriffs Association, or the National Sheriffs Educational Foundation related to the construction of a wall, fence, or other barrier along the U.S.-Mexico border.
4. To the extent not otherwise responsive to requests 1-3, records sufficient to identify any funds the U.S. Government has accepted or agreed to accept from American Border Foundation or Fund the Wall, or any funds otherwise pledged or promised to the U.S. Government by American Border Foundation or Fund the Wall, the National Sheriffs Association, or the National Sheriffs Educational Foundation related to the construction of a wall, fence, or other barrier along the U.S.-Mexico border.

American Oversight assesses that DHS is best positioned to determine the custodians most likely to possess the requested records. However, American Oversight requests that DHS search, at a minimum, the following offices:

- a. The Immediate Office of the Secretary;
- b. The Office of the Under Secretary for Management;
- c. The Office of Policy;

- d. The Office of the General Counsel; and
- e. Any offices involved in providing gift donation forms to outside individuals or groups.

Please provide all responsive records from January 21, 2017, 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 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 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 are subject to the Federal Records Act and FOIA.⁵ **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.**⁶

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

⁵ 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).

⁶ 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)).

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.⁷ Furthermore, agencies that have adopted the National Archives and Records Administration (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.**

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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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.

⁷ 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>.

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

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

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

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

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 DHS before it undertakes a search or incurs 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 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 a 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 the operations or activities of the government.”¹⁵ Specifically, there has been extraordinary public interest in the administration’s efforts to fund a wall or barrier along the U.S.-Mexico border,¹⁶

¹³ 6 C.F.R. § 5.11(k)(1)(i).

¹⁴ 6 C.F.R. § 5.11(k)(1)(ii).

¹⁵ 6 C.F.R. § 5.11(k)(1)(i); *see also* 6 C.F.R. § 5.11(k)(2)(i)–(iv).

¹⁶ *See, e.g.*, Bart Jansen, *Key Shutdown Question: How Much Border Wall Does \$5.7 Billion Buy?*, USA TODAY (Jan. 23, 2019, 12:53 PM), <https://www.usatoday.com/story/news/politics/2019/01/23/how-much-border-wall-does-5-billion-buy/2657385002/>; *Poll: Only 7% of Voters Back Wall Funding to End Shutdown*, DAILY BEAST, Jan. 23, 2019, <https://www.thedailybeast.com/poll-only-7-of-voters-back-wall-funding-to-end-shutdown>; Glenn Kessler, *Does President Trump’s Border Wall Pay for Itself?*, WASH. POST, Mar. 16, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/03/16/does-president-trumps-border-wall-pay-for-itself/?utm_term=.b78f3379019c; *Trump Says He Is Willing to ‘Close Government’ to Build Mexico Wall*, BBC NEWS, Aug. 23, 2017, <https://www.bbc.com/news/world-us-canada-41020779>; Steve Hollan & Miguel Gutierrez, *U.S.-Mexico Crisis Deepens as Trump Aide Floats Border Tax Idea*, REUTERS (Jan. 26, 2017, 9:09 AM), <https://www.reuters.com/article/us-usa-trump-mexico-idUSKBN15A1VE>; Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to Be Built and Plans to Block Syrian Refugees*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html>; Miriam Valverde, *How Trump Plans to Build, and Pay for, a Wall*

including whether and to what extent independent fundraising efforts, such as those by the American Border Foundation and the National Sheriffs' Association, will play a role.¹⁷ And, as discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁸ 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 uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promote their availability on social media platforms, such as Facebook and Twitter.¹⁹ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney, American Oversight promptly posted the records to its website²⁰ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²¹ Additionally, 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

Along U.S.-Mexico Border, POLITIFACT (July 26, 2016, 11:53 AM), <https://www.politifact.com/truth-o-meter/article/2016/jul/26/how-trump-plans-build-wall-along-us-mexico-border/>.

¹⁷ See, e.g., Will Sommer, *People Are Sending Total Strangers Money to Build Trump's Border Wall*, DAILY BEAST (Dec. 19, 2018, 10:04 PM), <https://www.thedailybeast.com/people-are-sending-total-strangers-money-to-build-trumps-border-wall>; Bradford Betz, *Border Wall Effort Getting Boost from US Sheriffs' Crowdfunding Site*, FOX NEWS, Sept. 20, 2018, <https://www.foxnews.com/us/border-wall-effort-getting-boost-from-us-sheriffs-crowdfunding-site>; Curt Brown, *Mass. Sheriff Hodgson Leads Crowdfunding Effort to Fund Border Wall*, PROVIDENCE JOURNAL (Sept. 6, 2018, 11:59 AM), <https://www.providencejournal.com/news/20180906/mass-sheriff-hodgson-leads-crowdfunding-effort-to-fund-border-wall>; *Not Clear How U.S. Would Get Money from Border Wall Fundraiser*, ASSOCIATED PRESS, Dec. 21, 2018, <https://www.apnews.com/4d33cbaaac2745059175bbbcc3031d11>; Jessica Estepa & Christal Hayes, *A GoFundMe Campaign Wants to Raise Money for a Border Wall. But It Isn't That Simple*, USA TODAY (Dec. 20, 2018, 1:16 PM), <https://www.usatoday.com/story/news/politics/2018/12/20/crowdfunding-border-wall/2373628002/>.

¹⁸ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

¹⁹ American Oversight currently has approximately 12,100 page likes on Facebook and 49,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 24, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 24, 2019).

²⁰ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²¹ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²²

Accordingly, American Oversight qualifies for a fee waiver.

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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. 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

²² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.