



March 29, 2017

VIA ELECTRONIC MAIL

U.S. Army Humphreys Engineer Support Center
Attention: CEHEC-OC
7701 Telegraph Road
Alexandria, Virginia, 22315-3860
foia@usace.army.mil

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and your agency's implementing regulations, 32 C.F.R. Parts 286 and 518, 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 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

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 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>.



southern border. It will be started ahead of schedule and, when finished, it will be a very effective weapon against drugs and crime.”³ Despite repeatedly pledging that he would make Mexico pay for the wall, it appears American taxpayers will be footing the bill for the construction.⁴ 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.⁵ Mr. Trump has insisted that he will be personally involved in the wall’s “design and negotiations” to ensure it comes in under budget.⁶

Mr. Trump has also demonstrated a predisposition to encourage the government to exercise its rights under the Takings Clause.⁷ Recent news reports indicate that the administration has already begun the eminent domain process in support of the wall.⁸ With current administration plans projecting completion in 2020⁹ and eminent domain actions unlikely to resolve in that time,¹⁰ it is of significant public interest to understand the administration’s plan to address the legal obstacle.

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 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>.

⁵ 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.”).

⁶ 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>.

⁷ Ilya Somin, *Donald Trump’s Great Wall of Eminent Domain*, WASH. POST, Apr. 1, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/01/donald-trumps-great-wall-of-eminant-domain/?utm_term=.322d7781bc30.

⁸ 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/>.

⁹ Ainsley, *supra* note 2.

¹⁰ David Ingold et al., *Here’s What We Know About Trump’s Mexico Wall*, BLOOMBERG, Mar. 2, 2017, <https://www.bloomberg.com/graphics/2017-trump-mexico-wall/will-eminant-domain-be-used/> (“Historically, wall-related land cases have taken years to resolve, with costly settlements often resulting. An Associated Press review of border-related eminent domain cases in 2012 found that the U.S. government spent approximately \$15 million to acquire 300 properties along the border in Texas.”).

Requested Records

American Oversight requests that the U.S. Army Corps of Engineers (USACE) produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. Any assessment or analysis regarding the eminent domain requirements for the construction of a wall, fence, or other physical barrier that would extend along the U.S.-Mexico border.
2. Any assessment or analysis regarding currently available appropriations to acquire land in connection with the construction of a wall, fence, or other physical barrier that would extend the full length of the U.S.-Mexico border.
3. All communications with non-governmental persons, corporations, or other entities who own land along the U.S.-Mexico border regarding potential or actual eminent domain actions. Please include any communications sent or received by USACE, or communications upon which USACE were copied.

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 USACE 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.¹¹ **It is not adequate to rely on policies and procedures that require**

¹¹ 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).

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.¹²

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 USACE’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.**¹³ 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 USACE’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that USACE 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.”¹⁴ 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

¹² 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)).

¹³ 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>.

¹⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”¹⁵ 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.”¹⁶ 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.’”¹⁷

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.¹⁸ 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, USACE 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 USACE 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 32 C.F.R. § 286.12(l)(1),¹⁹ 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

¹⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁷ *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)).

¹⁸ *Mead Data Central*, 566 F.2d at 261.

¹⁹ *See also* 32 C.F.R. § 518.19(d).

significant way.²⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.²¹

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.”²² The requested records will help American Oversight and the general public understand the progress of this mammoth government project. Media coverage of internal Department of Homeland Security (DHS) reports indicates that the wall could cost \$21.6 billion and take less than four years to procure and build a barrier extending over 1,250 miles.²³ That timeline does not comport with the government’s prior experience with border-related land acquisitions—legal actions that took years to settle and resulted in payouts of multiple millions of dollars.²⁴ Given that the government has already had adversarial experiences with land acquisition on the border, there is significant public interest in knowing how the government is planning to address this issue during this accelerated timeline; the requested records will meaningfully inform the public’s understanding of how and to what extent the government plans to seize land.

This request is primarily and fundamentally for non-commercial purposes.²⁵ 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.²⁶ 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.²⁷

Accordingly, American Oversight qualifies for a fee waiver.

²⁰ 32 C.F.R. § 286.12(l)(1). *See also* 32 C.F.R. § 518.19(d).

²¹ 32 C.F.R. § 286.12(l)(1). *See also* 32 C.F.R. § 518.19(d).

²² 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(i)-(ii). *See also* 32 C.F.R. § 518.19(d)(2); 32 C.F.R. § 518.19(d)(2)(i)-(iv).

²³ Ainsley, *supra* note 2.

²⁴ Ingold et al. *supra* 10.

²⁵ 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(iii). *See also* 32 C.F.R. § 518.19(d)(3); 32 C.F.R. § 518.19(d)(3)(i)-(ii).

²⁶ 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).

²⁷ *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 32 C.F.R. § 286.8(e),²⁸ American Oversight requests that USACE 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 urgent need to inform the public about the federal government activity that is the subject of this request. Media reports indicate funding for the wall could begin to be appropriated as soon as next month.²⁹ Despite not having secured funding, DHS has already issued its request for proposals with responses due today, less than two weeks after the RFP was released.³⁰ News stories about the wall are published on a daily basis.³¹ In order for there to be an informed debate, the public must be aware of the eminent-domain issues associated with the wall, and how the government intends to address those issues, before these decisions are made. The value of the information to this debate will be lost if the government is already committed or if relevant decisions have been made. It is imperative that the American people are made promptly aware of the efforts USACE is

²⁸ See also 32 C.F.R. § 518.8(d)(2)(iii).

²⁹ 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/>.

³⁰ 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.”).

³¹ 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 30; 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/.

undertaking in furtherance of this multi-billion-dollar construction project directed and financed by the federal government using tax dollars on an accelerated timeline.

I further 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,³² 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.”³³ American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media.³⁴ American Oversight will also make materials it gathers and its analysis of these materials available on our public website.³⁵

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 USACE 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

³² 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).

³³ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

³⁴ See *supra* note 26.

³⁵ See *supra* note 27.