



January 28, 2019

**VIA ELECTRONIC MAIL**

Dionne Hardy  
FOIA Officer  
Office of Management and Budget  
725 17th Street NW, Suite 9204  
Washington, DC 20503  
[OMBFOIA@omb.eop.gov](mailto:OMBFOIA@omb.eop.gov)

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

In December 2018, military veteran and motivational speaker Brian Kolfage launched a GoFundMe campaign to help fund President Trump's border wall, claiming he has senior administration contacts, including in the White House, to help ensure the funds reach the correct place.<sup>1</sup> The campaign quickly went viral, raising millions of dollars within days. Kolfage has since acknowledged that the federal government will not be able to accept the donations and has pivoted his strategy to one in which GoFundMe contributions will aid the private construction of a border wall.<sup>2</sup>

American Oversight requests the following records to shed light on who within the Trump administration may be in contact with Kolfage and his efforts to fundraise for—and now privately build—a border wall on the U.S.-Mexico boundary.

**Requested Records**

American Oversight requests that the Office of Management and Budget (OMB) produce the following within twenty business days:

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<sup>1</sup> Meagan Flynn & Lindsey Bever, *A Triple-Amputee Military Vet's GoFundMe Has Raised More Than \$13 Million for Trump's Border Wall*, WASH. POST, Dec. 21, 2018, [https://www.washingtonpost.com/nation/2018/12/20/triple-amputee-military-vet-raises-million-trumps-border-wall-four-days/?utm\\_term=.d805112c838d](https://www.washingtonpost.com/nation/2018/12/20/triple-amputee-military-vet-raises-million-trumps-border-wall-four-days/?utm_term=.d805112c838d).

<sup>2</sup> Kate Smith, *GoFundMe "Trump Wall" Donors Have Given \$7 Million to Organizer's New Idea: Privately Building the Wall*, CBS NEWS, Jan. 16, 2019, <https://www.cbsnews.com/news/gofundme-trump-wall-donors-have-given-7-million-to-organizers-new-idea-privately-building-the-wall/>.



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 OMB officials and Brian Kolfage—or any representative or affiliate of Brian Kolfage, his GoFundMe campaign, or his organization, “We Build the Wall, Inc.,” including but not limited to those individuals specified below:
  - i. Brian Kolfage (including email addresses bkolfage@gmail.com or bkolfage@yahoo.com)
  - ii. Robert S. Spalding III
  - iii. John Daniel Moran, Jr.
  - iv. Erik Prince
  - v. Kris Kobach
  - vi. Mary Ann Mendoza
  - vii. David Alexander Clarke, Jr.
  - viii. Tom Tancredo
  - ix. Steve Ronnebeck
  - x. Dustin Stockton
  - xi. Tiffany Ruegner
  - xii. Jennifer Lawrence
  - xiii. Amanda Shea
  - xiv. Sara Carter
  - xv. Anyone with an email address ending in @webuildthewall.us
  - xvi. Anyone with an email address ending in @briankolfage.com
2. To the extent not otherwise responsive to item 1, all records reflecting any agreement or contract between the U.S. Government and Brian Kolfage—or any representative or affiliate of Brian Kolfage, his GoFundMe campaign, or his organization, “We Build the Wall, Inc.”
3. To the extent not otherwise responsive to items 1-2, records sufficient to identify any funds offered, pledged, or promised to the U.S. Government by Brian Kolfage, his GoFundMe campaign, or his organization, “We Build the Wall, Inc.”
4. To the extent not otherwise responsive to items 1-3, records sufficient to identify any funds the U.S. Government has refused, accepted, or agreed to accept from Brian Kolfage, his GoFundMe campaign, or his organization, “We Build the Wall, Inc.”
5. To the extent not otherwise responsive to items 1-4, records sufficient to identify any plans for, or suggestions or offers of, private construction of sections of border wall, sponsored by Brian Kolfage, his GoFundMe campaign, or his organization, “We Build the Wall, Inc.”

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

- a. The Office of the Director;
- b. The Office of Federal Procurement Policy;

- c. The Office of the General Counsel;
- d. The General Government Programs Resource Management Office; and
- e. The National Security Programs Resource Management Office.

Please provide all responsive records from December 16, 2018, 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 you use 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.<sup>3</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>4</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 your

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<sup>3</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>4</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)).

agency'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>5</sup> 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 your agency's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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.”<sup>6</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>7</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>8</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>9</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>10</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.

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<sup>5</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>.

<sup>6</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>7</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>8</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

<sup>9</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>10</sup> *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, you are 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 a search or incurs search or duplication costs. By working together at the outset, American Oversight hopes to 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 your agency's implementing regulations, 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 public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 activities of the government. Specifically, there has been extraordinary public interest in the administration's efforts to fund a wall or barrier along the U.S.-Mexico border,<sup>11</sup> including whether and to what extent independent fundraising efforts—such as those by Brian Kolfage's GoFundMe campaign—

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<sup>11</sup> 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](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-idUSKBN15A1VF>; 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 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/>.

will play a role.<sup>12</sup> 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 not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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.<sup>13</sup> 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 website<sup>14</sup> and published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>15</sup> 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 and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.<sup>16</sup>

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<sup>12</sup> See, e.g., Flynn & Bever, *supra* note 1; Smith, *supra* note 2; 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/>; 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>.

<sup>13</sup> 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. 28, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 28, 2019).

<sup>14</sup> *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>15</sup> *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>.

<sup>16</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 your agency 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](mailto: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