

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 17-1187

U.S. DEPARTMENT OF
HOMELAND SECURITY,
245 Murray Lane SW
Washington, DC 20528

U.S. CUSTOMS AND
BORDER PROTECTION,
1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. DEPARTMENT OF THE INTERIOR,
1849 C Street NW
Washington, DC 20240

and

OFFICE OF MANAGEMENT AND BUDGET,
725 17th Street NW
Washington, DC 20503

Defendants.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Homeland Security, the U.S. Customs and Border Protection, the U.S. Department of the Interior, and the Office of Management and Budget under the Freedom of Information Act,

5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants have failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia, and its application for § 501(c)(3) status is pending with the Internal Revenue Service.

6. Defendant U.S. Department of Homeland Security (DHS) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of

the federal government within the meaning of 5 U.S.C. § 552(f)(1). The DHS Privacy Office (DHSO) coordinates FOIA requests for several DHS components, including the Office of the Secretary, Office of the Executive Secretary, Office of Intergovernmental Affairs, Management Directorate, Office of Policy, Office of the General Counsel, Office of Legislative Affairs, and Office of Public Affairs. DHSO has possession, custody, and control of the records that American Oversight seeks.

7. Defendant U.S. Customs and Border Protection (CBP) is a component of DHS and is also headquartered in Washington, DC. CBP has possession, custody, and control of the records that American Oversight seeks.

8. Defendant U.S. Department of the Interior (DOI) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Bureau of Land Management (BLM) is a component of DOI. DOI has possession, custody, and control of the records that American Oversight seeks.

9. Defendant the Office of Management and Budget (OMB) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Washington, DC. OMB has possession, custody, and control of the records that American Oversight seeks.

10. Defendant the Office of Management and Budget (OMB) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Washington, DC. OMB has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

11. On information and belief, DHSO is coordinating all FOIA requests received by any DHS component—whether or not the request relates to records in the possession, custody, or

control of DSHQ—regarding records related to Executive Order 13767 and the construction of a wall along the U.S.-Mexico border.

12. On information and belief, DHS components are to defer to non-records-related decisions DSHQ makes with regard to FOIA requests, such as the grant of fee waiver and expedited processing.

DHS Baseline Analysis Requests

Schedule FOIA

13. On March 21, 2017, American Oversight submitted a FOIA request to DSHQ and CBP bearing internal tracking number DHS-17-0040 seeking access to the following records on an expedited basis:

- 1) All records concerning the schedule or schedules for the initiation, construction, and or completion of a wall, fence, or other physical barrier on the U.S.–Mexico border.
- 2) Any preliminary or final analysis regarding the scheduling or timing of the initiation, construction, or completion of such a wall, fence, or physical barrier.
- 3) All correspondence sent or received by political appointees within the agency or individuals appointed to or acting in presidential appointment with Senate confirmation (PAS) positions within the agency concerning the schedule for the initiation, construction, or completion of such a wall, fence, or physical barrier.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

14. DSHQ assigned the request tracking number 2017-HQFO-00564.

15. CBP assigned the request a tracking number ending in the numerical sequence 2017-041455.¹

16. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(iv).

17. DSHQ informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.

18. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

Costs and Appropriations FOIA

19. On March 21, 2017, American Oversight submitted a FOIA request to DSHQ and CBP bearing internal tracking number DHS-17-0045 seeking access to the following records on an expedited basis:

- 1) All communications, informational materials, talking points, reports, assessments, analyses, or other materials regarding the cost of the proposed wall, including any fence or other physical barrier along the U.S.–Mexico border.
- 2) All communications, informational materials, talking points, reports, assessments, analyses, or other materials regarding the availability of budgeted funds, and/or constraints on planning for and construction of such a wall, fence, or other physical barrier.
- 3) All communications, informational materials, talking points, reports, assessments, analyses, or other materials regarding the availability or unavailability of current appropriations for planning for and construction of such a wall, fence, or other physical barrier, including any evaluation, assessment, or

¹ CBP has changed the introductory identifier to its FOIA requests on numerous occasions. For example, this particular FOIA was initially changed from CBP-2017-041455 to CBP-OAM-2017-041455 and has been changed subsequently as well. Based on conversations counsel for American Oversight had with FOIA personnel at CBP, American Oversight understands that CBP can identify FOIAs based solely on the numeric portion of the tracking number. For simplicity and clarity, American Oversight only references the numeric portion of CBP tracking numbers throughout this Complaint.

analysis of currently available appropriations that could be used to fund design, preliminary work, or construction of such a wall, fence, or other physical barrier.

- 4) All communications concerning the appropriations and budgeting requests concerning the wall, fence, or other physical barrier between DHS or its components and Congress, including congressional committees or staff. Please include any communications sent or received by DHS or its components, or communications upon which DHS or its components were copied.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

20. DSHQ assigned the request tracking number 2017-HQFO-00569.
21. CBP assigned the request a tracking number ending in the numerical sequence 2017-041471.
22. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(iv).
23. DSHQ informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.
24. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

Eminent Domain FOIA

25. On March 21, 2017, American Oversight submitted a FOIA request to DSHQ and CBP bearing internal tracking number DHS-17-0042 seeking access to the following records on an expedited basis:

- 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 DHS or its components, or communications upon which DHS or its components were copied.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

26. DSHQ assigned the request tracking number 2017-HQFO-00566.
27. CBP assigned the request a tracking number ending in the numerical sequence 2017-041459.
28. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(iv).
29. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

SBI Net FOIA

30. On March 21, 2017, American Oversight submitted a FOIA request to DSHQ and CBP² bearing internal tracking number DHS-17-0046 seeking access to the following records on an expedited basis:

- 1) All communications regarding the January 2010 decision to initiate a reassessment of the SBI Net program.
- 2) Any memoranda or reports, and supporting material, prepared for Secretary Napolitano regarding the efficacy, performance, cost, or utility of the SBI Net program.

² American Oversight also submitted this request to DHS's Office of Intelligence & Analysis; that component has already responded to the request.

- 3) Any memoranda or reports, and supporting material, prepared for the Trump administration regarding the efficacy, performance, cost, or utility of the SBInet program.
- 4) Any decision memoranda prepared regarding the January 2011 cancellation of the SBInet program.
- 5) Any records analyzing or reviewing the SBInet program in connection with any analysis or evaluation of the proposal to build a wall, fence, or other physical barrier between the U.S. and Mexico.

American Oversight requested all responsive records from January 1, 2010, through January 31, 2011, as well as all responsive records from November 8, 2016, through the date of the search.

31. DSHQ assigned the request tracking number 2017-HQFO-00570.
32. CBP assigned the request a tracking number ending in the numerical sequence 2017-041474.
33. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(iv).
34. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

Tohono O'odham Nation Requests

DHS Tohono Communications FOIA

35. On March 29, 2017, American Oversight submitted a FOIA request to DSHQ and CBP bearing internal tracking number DHS-17-0054 seeking access to the following records on an expedited basis:

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 DHS on the tribe's behalf, and DHS.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

36. DSHQ assigned the request tracking number 2017-HQFO-00590.

37. CBP assigned the request a tracking number ending in the numerical sequence 2017-044167.

38. DSHQ has not responded to American Oversight's request for expedited processing.

39. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

DHS Tohono Analysis FOIA

40. On March 29, 2017, American Oversight submitted a FOIA request to DSHQ and CBP bearing internal tracking number DHS-17-0055 seeking access to the following records on an expedited basis:

All analyses, memoranda, or reports regarding sovereign tribal land and the construction of a contiguous wall, fence, or other physical barrier along the U.S.-Mexico border.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

41. DSHQ assigned the request tracking number 2017-HQFO-00591.

42. CBP assigned the request a tracking number ending in the numerical sequence 2017-044168.

43. Neither DSHQ nor CBP has responded to American Oversight's request for expedited processing.

44. DHS informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.

45. Neither DSHQ nor CBP has determination as to American Oversight's FOIA request.

DOI Tohono Communications and Analysis FOIA

46. On March 29, 2017, American Oversight submitted a FOIA request to BLM bearing internal tracking number DOI-17-0052 seeking access to the following records on an expedited basis:

- 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 DOI on the tribe's behalf, and DOI.
- 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 DOI regarding the Tohono O'odham Nation.
- 3) All analyses, memoranda, or reports regarding sovereign tribal land and the construction of a contiguous wall, fence, or other physical barrier along the U.S.-Mexico border.

American Oversight requested all responsive records from November 8, 2016, through the date of the search.

47. American Oversight has not received any further communication from BLM regarding this FOIA request. American Oversight has not received any communication from BLM acknowledging receipt of this FOIA request or providing American Oversight with an agency tracking number for this FOIA request.

48. American Oversight has not received any response from BLM regarding American Oversight's request for expedited processing of this FOIA request.

49. BLM has not made a determination as to American Oversight's FOIA request.

Budget Requests

OMB Budget I FOIA

50. On April 25, 2017, American Oversight submitted a FOIA request to OMB bearing internal tracking number OMB-17-0112 seeking access to the following records on an expedited basis:

All communications with Congress, including any member of Congress or congressional staff, regarding the inclusion of border funding or wall funding in any congressional resolutions or bills to extend government funding beyond April 28, 2017. Please include all communications concerning any negotiations related to the inclusion of border funding or wall funding in such resolutions or bills, as well as any consideration offered in exchange for the inclusion of such funding.

The search for responsive records should include individuals and locations where records are likely to exist, including but not limited to: Mick Mulvaney, the Office of the Director, the Office of the Deputy Director, the Office of Legislative Affairs, the General Government Programs (GGP) component of the Resource Management Offices (or any such successor component in a restructured Trump administration OMB), and the Homeland Security Branch of GGP (or any such successor component in a restructured Trump administration OMB), as well as any other office engaged in negotiations or communications over extending government funding beyond April 28, 2017.

American Oversight requested all responsive records from January 20, 2017, through the date of the search.

51. OMB assigned the request tracking number 2017-183.

52. OMB denied American Oversight's request for expedited processing under 5 C.F.R. § 1303.10(d)(1)(ii), (iv).

53. OMB has not made a determination as to American Oversight's FOIA request.

OMB Budget II FOIA

54. On May 3, 2017, American Oversight submitted a FOIA request to OMB bearing internal tracking number OMB-17-0119 seeking access to the following records on an expedited basis:

All communications with Congress, including any member of Congress or congressional staff, regarding the inclusion of border funding or wall funding in any congressional resolutions or bills to extend government funding for any period between April 28, 2017, and September 30, 2017. Please include all communications concerning any negotiations related to the inclusion of border funding or wall funding in such resolutions or bills, as well as any consideration offered in exchange for the inclusion of such funding.

The search for responsive records should include individuals and locations where records are likely to exist, including but not limited to: Mick Mulvaney, the Office of the Director, the Office of the Deputy Director, the Office of Legislative Affairs, the General Government Programs (GGP) component of the Resource Management Offices (or any such successor component in a restructured Trump administration OMB), and the Homeland Security Branch of GGP (or any such successor component in a restructured Trump administration OMB), as well as any other office engaged in negotiations or communications over extending government funding for any period between April 28, 2017, and September 30, 2017.

American Oversight requested all responsive records from January 20, 2017, through the date of the search.

55. OMB assigned the request tracking number 2017-200.
56. OMB has not responded to American Oversight's request for expedited processing.
57. OMB has not made a determination as to American Oversight's FOIA request.

DHSHQ Budget FOIA

58. On May 3, 2017, American Oversight submitted a FOIA request to DHSHQ bearing internal tracking number DHS-17-0121 seeking access to the following records on an expedited basis:

- 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.

American Oversight requested all responsive records from January 20, 2017, through the date of the search.

59. DHSHQ assigned the request tracking number 2017-HQFO-00728.

60. DHSHQ granted expedited processing as requested under 6 C.F.R.

§ 5.5(e)(1)(ii), (iv).

61. DHSHQ informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.

62. DHSHQ has not made a determination as to American Oversight's FOIA request.

CBP Budget FOIA

63. On May 3, 2017, American Oversight submitted a FOIA request to CBP bearing internal tracking number DHS-CBP-17-0122 seeking access to the following records on an expedited basis:

- 1) All communications with representatives of the National Border Patrol Council (NBPC) union—including, but not limited to: members of the NPBC Executive Committee: Brandon Judd, Paul Perez, Eric Sparkman, Albert Trevino, Art Del Cueto, Mike Egerton, Jon Anfinson, Hector Garza, Chris Kraus, Rob Russell, and Bud Tuffy; and any locals, including 1613 (San Diego), 1929 (El Paso), 2366 (Del Rio), 2455 (Laredo), 2509 (Big Bend), 2544 (Tucson), 2554 (El Centro), 2595 (Yuma), and 3307 (Rio Grande Valley)—regarding the availability of funds for the construction of a wall, fence, or other physical or virtual barrier along the U.S.-Mexico border, or regarding the views of the union or union members on the desirability or effectiveness of such a wall, fence, or other barrier.
- 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: the Office of the Commissioner, including the Commissioner, Chief of Staff, Deputy Chief of Staff, and Deputy Chief of Staff—Policy; the Office of the Deputy Commissioner, including the Deputy Commissioner and the Deputy Commissioner's Chief of Staff; the Office of Congressional Affairs, including the Assistant Commissioner for Congressional Affairs; the U.S. Border Patrol, including the Office of the Chief, and the following sectors: San Diego, El Centro, Yuma, Tucson, El Paso, Big Bend, Del Rio, Laredo, and Rio Grande Valley.

American Oversight requested all responsive records from January 20, 2017, through the date of the search.

64. CBP assigned the request a tracking number ending in the numerical sequence 2017-054207.

65. DSHQ informed American Oversight that CBP had routed the request to DSHQ in light of DSHQ's coordinating role.

66. DSHQ assigned the request tracking number 2017-HQFO-00918.

67. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(ii), (iv).

68. DSHQ informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.

69. Neither DSHQ nor CBP has made a determination as to American Oversight's FOIA request.

Secretary Kelly Hearing FOIA

70. On April 5, 2017, American Oversight submitted a FOIA request to DSHQ bearing internal tracking number DHS-17-0076 seeking access to the following records on an expedited basis:

- 1) Any communications with non-government entities or parties relating to the "requirements analysis" to seek input from DHS field agents.
- 2) Any briefing materials prepared for Mr. Kelly regarding his February 1, 2017, visit to McAllen, Texas.
- 3) Any communications between Mr. Kelly, or anyone acting on his behalf, with President Enrique Peña Nieto, or anyone acting on his behalf, concerning the wall, fence, or other physical or virtual barrier, and who will pay for it.
- 4) Any materials prepared for Mr. Kelly regarding the Tohono O'odham Nation as it relates to construction of a wall, fence, or other physical or virtual barrier on Tohono land.

- 5) Any communications from Mr. Kelly relating to the length of any proposed or planned physical barrier along the U.S.-Mexico border. Materials responsive to this request would include, but are not limited to, emails from Mr. Kelly stating that the wall will not be the entire length of the border.
- 6) Any recommendations to or final decisions of Mr. Kelly regarding the laws that will or will not be waived under Section 102 of the REAL ID Act.

American Oversight requested all responsive records from January 20, 2017, through the date of the search.

71. DSHQ assigned the request tracking number 2017-HQFO-00618.
72. DSHQ granted expedited processing as requested under 6 C.F.R. § 5.5(e)(1)(iv).
73. DSHQ informed American Oversight that, under authority granted by FOIA, the agency was invoking a ten-day extension to make a determination regarding the request.
74. DSHQ has not made a determination as to American Oversight's FOIA request.

Agency Inaction

75. As of the date of this Complaint, Defendants have failed to (i) notify American Oversight of any determination regarding the requests, including the scope of any responsive records Defendants intend to produce or withhold and the reasons for any withholdings; or (ii) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

76. Through Defendants' failure to respond to American Oversight's FOIA request within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Records

77. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

78. American Oversight properly requested records within the possession, custody, and control of the Defendants.

79. Defendants are agencies and a component thereof subject to FOIA and must therefore make reasonable efforts to search for requested records.

80. Defendants have failed to promptly review agency records for the purpose of locating those records which are responsive to American Oversight's request.

81. Defendants' failure to conduct an adequate search for responsive records violates FOIA.

82. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA request.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Records

83. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

84. American Oversight properly requested records within the possession, custody, and control of the Defendants.

85. Defendants are agencies and a component thereof subject to FOIA and must therefore release in response to a FOIA requests any disclosable records and provide a lawful reason for withholding any materials.

86. Defendants are wrongfully withholding agency records requested by American Oversight by failing to produce records responsive to its FOIA request.

87. Defendants' failure to provide all responsive records violates FOIA.

88. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search reasonably calculated to uncover all records responsive to American Oversight's FOIA requests identified in this Complaint;
- (2) Order Defendants to produce, by such a date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA request;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: June 16, 2017

Respectfully submitted,

/s/ Cerissa Cafasso

Cerissa Cafasso

D.C. Bar No. 1011003

John E. Bies

D.C. Bar No. 483730

AMERICAN OVERSIGHT

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