

# EXHIBIT B



February 25, 2020

**VIA Facsimile**

Leah Fairman  
Office of the Secretary  
MS-7328, MIB  
1849 C Street, N.W.  
Washington, DC 20240  
Facsimile: (202) 219-2374

**Re: Freedom of Information Act Records Request**

Dear FOIA Officer,

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Department of the Interior regulations at 43 C.F.R. Part 2, Democracy Forward Foundation makes the following request for records.

**Records Requested**

The Coastal Barrier Resources Act (CBRA) protects undeveloped coastal areas such as sand bars, barrier islands, and dunes, from federally-funded development.<sup>1</sup>

In 1994, the Fish and Wildlife Service was asked whether a project that would remove sand from a protected area within the Coastal Barrier Resources System to renourish a beach outside the System would be a permissible use of federal funds under CBRA, specifically under the exception detailed in CBRA Section 6(a)(6)(G).<sup>2</sup> The FWS Assistant Solicitor concluded that CBRA did not allow federal funds to be spent on a project that would remove sand from within the protected CBRA System to renourish beaches outside the System.

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<sup>1</sup> See 16 U.S.C. Sec. 3501 *et seq.*

<sup>2</sup> Memorandum from Charles P. Raynor, Assistant Solicitor, Fish and Wildlife to Ralph Morgenweck, Assistant Director, Fish and Wildlife Enhancement on Interpretation of Section 6(a)(6)(G) of the Coastal Barrier Resources Act, FWS.CW.0380 (1994), attached as Exhibit A.

This 1994 Memorandum was viewed as controlling authority within DOI and FWS through 2018.<sup>3</sup>

In late 2019, however, certain Congressional representatives asked Secretary Bernhardt to revisit the issue.<sup>4</sup> Six working days later, on Nov. 4, 2019, Bernhardt responded to the members and explained that he had asked Interior's Office of the Solicitor to review the 1994 Memorandum, and that the Solicitor had concluded that the section 6(a)(6)(G) exception is *not* limited only to projects within the System; Bernhardt also explained that he had personally reviewed the question and agreed.<sup>5</sup>

In an effort to better understand and explain to the public the development of this new policy towards CBRA-protected areas, Democracy Forward Foundation requests that the Department of the Interior's Office of the Secretary and Office of the Solicitor produce the following within twenty (20) business days:

1. A copy of the Office of the Solicitor opinion referred to in Secretary Bernhardt's Nov. 4 Letter in which the Office of the Solicitor "determined that the exemption in section 6 is not limited to shoreline stabilization projects occurring within the System."
2. All records concerning the Coastal Barrier Resources Act, Section 6(a)(6)(G) exception, including but not limited to, all records containing any of the search terms from the below list:
  - a. 6(G)
  - b. 6(a)(6)(G)
  - c. exception AND "Section 6" (or "Sec. 6")
  - d. exemption AND "Section 6" (or "Sec. 6")
  - e. Morgenweck
  - f. FWS.CW.0380
  - g. "shoreline stabilization"

The date range for this request is December 1, 2018 to the date the search is conducted.

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<sup>3</sup> See, e.g., Letter from Margaret Everson, Principal Deputy Director, FWS to the Honorable Garret Graves (Dec. 21, 2018) (noting that a subsequent review of the 1994 Memorandum in 1995 "reaffirmed this interpretation of the law;" noting that the 1994 Memorandum's conclusion "has been the basis for [FWS's] interpretation and advice to other federal agencies for over 20 years;" noting that Congress had subsequently reauthorized CBRA twice "without regard to this interpretation;" and affirming that FWS "currently has no plan to revisit this interpretation"), attached as Exhibit B.

<sup>4</sup> Letter from Representatives Jeff Van Drew, David Rouzer, and Garret Graves to the Honorable David Bernhardt (Oct. 25, 2019), attached as Exhibit C.

<sup>5</sup> Letter from Secretary David Bernhardt to the Honorable David Rouzer (Nov. 4, 2019), attached as Exhibit D.

### **Scope of Search**

For responsive records, please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions. In searching for responsive records, however, please exclude publicly available materials such as news clips that mention otherwise responsive search terms.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See id.* § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and the legal and factual grounds for withholding any documents or portions thereof in an index, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and non-disclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office, installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity.

Please respond to this request in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(i). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

### **Fee Waiver Request**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. §§ 2.37 *et seq.*, Democracy Forward Foundation requests a waiver of all fees associated with processing records for this request. FOIA requires documents to be furnished to requesters at no fee or reduced fees when “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A).

*The disclosure of records sought by this Request is likely to contribute significantly to the public understanding of the operations or activities of the government.*

The decision to change the interpretation of CBRA is likely to impact a number of federally-funded development projects in coastal areas that were previously protected from development. These areas often have significant environmental and ecological benefits, as geologic protections from erosion and storm surges, and as habitats for a large variety of coastal wildlife, including migratory birds. Thus, policies that may affect the protections for these areas are matters of significant import to the public, and the records requested will contribute to the public's understanding of the operation and activities of the government.

*Democracy Forward Foundation is able to, and regularly does, disseminate Records obtained through FOIA requests to a broad audience of persons interested in the subject matter.*

In determining whether a fee waiver is appropriate, courts consider whether a requester has a “demonstrated . . . ability to disseminate the requested information,” *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116-17 (D.C. Cir. 2015), and whether the requester regularly disseminates records obtained through FOIA to “a reasonably broad audience of persons interested in the subject” of its work. *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994). FOIA does not require a requester to describe exactly how it intends to disseminate the information requested, as that would require “pointless specificity”; all that is necessary is for a requester to adequately demonstrate its “ability to publicize disclosed information.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003). In evaluating a fee waiver request, courts consider how a requester actually communicates information collected through FOIA to the public, including press releases or a website where documents received are made available, see *id.*, or whether the requester has a history of “contacts with any major news[] companies” that suggest an ability to disseminate materials of interest through the press. *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (upholding a denial of a fee waiver to a requester who had failed to identify his relationships with newspaper companies that could disseminate documents).

DFF has a demonstrated ability to disseminate information of public interest requested through FOIA, and intends to publicize records DFF receives that contribute significantly to the public's understanding of the extent to which the changes to the interpretation of CBRA may affect federally-funded development projects in coastal areas previously protected from development.

DFF operates a dedicated communications staff with deep relations with a wide variety of national publications. When DFF obtains materials through FOIA requests that are of significant public interest, DFF's communications staff regularly works to ensure that these materials and their contents are featured in press articles educating the public about the operation of government; many articles feature additional commentary and analysis from DFF staff about those materials and their relevance to policy issues of public interest.<sup>6</sup>

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<sup>6</sup> See, e.g., Alexander Nazaryan, *Why did right-wing troll Charles C. Johnson meet with Commerce Secretary Wilbur Ross?*, Yahoo News (May 14, 2019), <https://news.yahoo.com/why-did-rightwing-troll-charles-c-johnson-want-to-meet-with-commerce-secretary-wilbur-ross-090000636.html>; Derek Kravitz and Jack Gillum, “Happy to Do It”: Emails Show Current

Additionally, DFF regularly sends press releases and other materials to over 6,000 members of the press and the over 7,000 members on our organization's email list, discussing ongoing legal developments related to executive branch policymaking. These materials often include descriptions and analysis of information obtained by DFF through its FOIA requests.<sup>7</sup> In

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*FAA Chief Coordinated With Ex-Lobbyist Colleagues on Policy*, ProPublica (Mar. 27, 2019), <https://www.propublica.org/article/dan-elwell-current-faa-chief-coordinated-with-ex-lobbyist-colleagues-on-policy>; Hamid Aleaziz, *Emails Show US Border Officials Didn't Receive "Zero Tolerance" Guidance Until After the Policy Was Enacted*, BuzzFeed News (Feb. 28, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/zero-tolerance-policy-guidance-dhs-family-separation>; Jonathan Cohn and Jeffrey Young, *Emails Show Trump Administration Was Told Obamacare Ad Cuts Could Hurt Enrollment*, Huffpost (Dec. 17, 2018), [https://www.huffingtonpost.com/entry/trump-verma-obamacare-advertising-cut\\_us\\_5c115061e4b084b082ff8dba](https://www.huffingtonpost.com/entry/trump-verma-obamacare-advertising-cut_us_5c115061e4b084b082ff8dba); Madison Pauly, *When the Biggest Prison Company Complained About a California Sanctuary Law, ICE Listened*, Mother Jones (Dec. 7, 2018), <https://www.motherjones.com/politics/2018/12/geo-memo-private-prison-california-immigration/>; Eliza Rellman, *'Just answer the question and kill this story': In internal emails, Heather Nauert criticized Rex Tillerson's refusal to deny reports that he called Trump a 'moron.'* Business Insider (Nov. 2, 2018), <https://www.businessinsider.com/heather-nauert-rex-tillerson-trump-moron-2018-11>; Rebecca Klein, *Lawsuit Accuses Betsy DeVos And Her Deputies Of Being Motivated By Sexism*, HuffPost (Oct. 31, 2018), [https://m.huffpost.com/us/entry/us\\_5bd9ff6ee4b01abe6a1ad4a9](https://m.huffpost.com/us/entry/us_5bd9ff6ee4b01abe6a1ad4a9); Nick Penzenstadler, *A year after Vegas shooting, ATF emails reveal blame, alarm over bump stocks*, USA Today (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/10/01/year-after-vegas-shooting-atf-emails-reveal-blame-alarm-over-bump-stocks/1432137002/>; Jessica Kwong, *Ivanka Trump was more than complicit in Obama equal pay rollback-she had a hand in it, watchdog alleges*, Newsweek (Aug. 29, 2018), <https://www.newsweek.com/ivanka-trump-equal-pay-complicit-obama-1093833>; Vera Bergengruen, *New Emails Show What Happens When The Pentagon Has To Scramble To Catch Up To Trump*, BuzzFeed News (July 25, 2018), <https://www.buzzfeednews.com/article/verabergengruen/these-emails-show-what-happens-when-the-white-house-keeps>; Erin Dooley, *Exclusive: Former for-profit college executive shaped Education Department policy that could benefit former employers: Documents*, ABC News (May 15, 2017), <https://abcnews.go.com/US/exclusive-profit-college-executive-shaped-education-department-policy/story?id=55108981>; Heidi Przybyla, *Notes, emails reveal Trump appointees' war to end HHS teen pregnancy program*, NBC News (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686>; Dominic Holden, *Documents Show The Trump Administration Approved Bump Stocks Before It Opposed Them*, BuzzFeed News (Mar. 22, 2018), <https://www.buzzfeednews.com/article/dominicholden/trump-administration-bump-stocks>; Bernard Condon, *Trump Advisor Denies He Cheered End of Tunnel Funding Deal*, Associated Press (Feb. 13, 2018), available at <https://www.usnews.com/news/business/articles/2018-02-13/trump-adviser-denies-he-cheered-end-of-tunnel-funding-deal>; Celeste Katz, *Interior Department tapped wildfire preparedness funds for Ryan Zinke helicopter tour*, Newsweek (Dec. 29, 2017), <https://www.newsweek.com/ryan-zinke-interior-department-helicopters-wildfires-757857>

<sup>7</sup> See, e.g., *BREAKING: At Congressional Hearing, Sec. DeVos Confronted With Records Revealing Trump Administration's Unlawful Decision to Permit Federal Funds to Arm Teachers* (Apr. 10, 2019),

addition, DFF operates a verified Twitter account with over 8,000 followers, and frequently uses the account to circulate significant documents received through FOIA requests.<sup>8</sup>

DFF's website also houses a great deal of information obtained through its FOIA requests, accessible to the public at no cost. DFF's website logged over 187,000 pageviews in 2018 alone.

Finally, DFF frequently incorporates documents received through FOIA into related legal actions brought by DFF on behalf of its clients, and in doing so further publicizes documents received by explaining their legal significance.<sup>9</sup>

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<https://democracyforward.org/press/breaking-at-congressional-hearing-sec-devos-confronted-with-records-revealing-trump-administrations-unlawful-decision-to-permit-federal-funds-to-arm-teachers/>;

*BREAKING: New Evidence Reinforces Claim Trump's Title IX Policy Was Based on Sexist Stereotypes, Rendering it Unconstitutional* (Nov. 1, 2018),

<https://democracyforward.org/press/breaking-new-evidence-reinforces-claim-trumps-title-ix-policy-was-based-on-sexist-stereotypes-rendering-it-unconstitutional/>; *On 1-Year Anniversary of Equal Pay Roll Back, New Documents Reveal Ivanka Trump's Role in Trump Administration Decision to Roll Back Protections for Women and Working Families* (Aug. 29, 2018),

<https://democracyforward.org/press/on-1-year-anniversary-of-equal-pay-roll-back-new-documents-reveal-ivanka-trumps-role-in-trump-administration-decision-to-roll-back-protections-for-women-and-working-families/>; *Democracy Forward Demands Ethics Investigation into White House Official's Role in Developing Special Drug Pricing Project With Novartis* (July 11, 2018),

<https://democracyforward.org/press/democracy-forward-demands-ethics-investigation-into-white-house-officials-role-in-developing-special-drug-pricing-project-with-novartis/>; *BREAKING: New Records Reveal DeVos Senior Advisor And Former For-Profit College Executive Directed Rollback of Protections Against Predatory Student Loans* (May 15, 2018),

<https://democracyforward.org/press/breaking-new-records-reveal-devos-senior-advisor-former-profit-college-executive-directed-rollback-protections-predatory-student-loans/>; *BREAKING: New Records Suggest Trump-Appointed Political Officials Drove HHS Decision To End Program Grants That Have Helped Reduce Teen Pregnancy Rates To All-Time Low* (Mar. 20, 2018),

<https://democracyforward.org/press/breaking-new-records-suggest-trump-appointed-political-officials-drove-hhs-decision-end-program-grants-helped-reduce-teen-pregnancy-rates-time-low/>.

<sup>8</sup> See, e.g., the following tweets and tweet threads from @DemocracyFwd:

<https://twitter.com/DemocracyFwd/status/910123899035226112> (Sep. 19, 2017);

<https://twitter.com/DemocracyFwd/status/976991060680462336> (Mar. 22, 2018);

<https://twitter.com/DemocracyFwd/status/996480908877271042> (May 15, 2018);

<https://twitter.com/DemocracyFwd/status/998986714105483264> (May 22, 2018);

<https://twitter.com/DemocracyFwd/status/1022870550769754112> (July 27, 2018);

<https://twitter.com/DemocracyFwd/status/1035144352345903105> (Aug. 30, 2018);

<https://twitter.com/DemocracyFwd/status/1053294640382779392> (Oct. 19, 2018);

<https://twitter.com/DemocracyFwd/status/1071105652867690496> (Dec. 7, 2018).

<sup>9</sup> See, e.g., Second Amended Complaint for Injunctive Relief at 31, *SurvJustice, Inc., et al. v. DeVos et al.*, No. 3:18-cv-00535-JSC (N.D. Cal. Oct. 31, 2018), ECF No. 86, reported on in Klein, *supra* n. 1; Memorandum of Law in Support of Plaintiffs' Motion for Preliminary and Permanent Injunction at 14-15,

*Democracy Forward Foundation is a purely noncommercial requester.*

Democracy Forward Foundation is not filing this Request to further its commercial interest, and any information disclosed by DFF as a result of this FOIA request will be disclosed at no cost. A fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

*Democracy Forward is a representative of the news media.*

A representative of the news media is one that "publishes or otherwise disseminates information to the public," and in particular one that "gathers information from a variety of sources; exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them; devises indices and finding aids; and distributes the resulting work to the public." *Nat'l Sec. Archive v. US Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Representatives of the news media qualify for a waiver of all fees except "reasonable standard charges for document duplication" as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II).

As documented above, DFF extensively disseminates information gathered through FOIA requests to the public, via sharing that information with other news outlets, publishing and sending press releases and other updates to our website and email list, and alerting our followers on social media to new developments in our work, including highlights from documents obtained through FOIA. This process entails a great degree of editorial discretion in deciding which documents to highlight and how to organize them for the public, as our team of lawyers and policy experts carefully examine and build a thorough understanding of the documents we receive from FOIA and their relationship to policies of interest to the public.

Beyond disseminating information to reporters for them to publish, and sharing press releases and updates, Democracy Forward has also sought to disseminate information directly to the public through reports and opinion pieces written by our staff.<sup>10</sup>

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*Healthy Teen Network and Mayor and City Council of Baltimore v. Azar and U.S. Dep't of Health and Human Services*, No. 1:18-cv-00468-CCB (D. Md. Mar. 27, 2018), ECF No. 18-1, reported on in Przybyla, *supra* n. 1.

<sup>10</sup> See, e.g., *A Blueprint for Cronyism: President Trump's Illegal Infrastructure Plan to Enrich His Friends*, Democracy Forward Foundation (Jan. 30, 2018), <https://democracyforward.org/wp-content/uploads/2018/01/Infrastructure-Report.pdf>; Elana Schor, *Trump critics seize on developer ties to infrastructure plan*, Politico (Jan. 30, 2018), <https://www.politico.com/story/2018/01/30/trump-infrastructure-developers-state-of-union-376326> (press coverage of DFF's report on White House infrastructure policy); *Airlines and the Trump Administration*, Democracy Forward Foundation (Jan. 11, 2018), <https://democracyforward.org/updates/airlines-and-the-trump-administration/>; Bart Jansen, *Lost bags, airline fees: Protections for travelers rights stall under Trump*, USA Today (Jan. 19, 2018), <https://www.usatoday.com/story/news/2018/01/19/lost-bags-airline-fees-protections-travelers-rights-stall-under-trump/1043879001/> (press coverage utilizing the information DFF organized regarding regulatory changes); *What Has Trump Done on Guns? A Lot.*, Democracy Forward Foundation (Feb. 21, 2018),



For all the foregoing reasons, Democracy Forward Foundation qualifies for a fee waiver.

If the request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to \$100. If the costs of responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

### **Conclusion**

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles in meeting the request within 20 working days, please contact [foia@democracyforward.org](mailto:foia@democracyforward.org).

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Sam Ritzman

Sam Ritzman

Democracy Forward Foundation

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<https://democracyforward.org/updates/trump-done-guns-lot/>; Christi Parsons, *Trump 'supportive' of tougher gun law, but his record suggests that may not mean much*, LA Times (Feb. 20, 2018) (press coverage utilizing the information DFF organized regarding regulatory changes); Anne Harkavy and Farhana Khera, *When the Trump administration lies, it might literally be illegal: Learn about the Information Quality Act*, NY Daily News (Feb. 14, 2019), <https://www.nydailynews.com/opinion/ny-oped-when-the-trump-administration-lies-it-might-literally-be-illegal-20190213-story.html> (piece co-authored by DFF executive director); Meg Uzzell and Rachael Klarman, *Why These Women Are Suing Trump to Help End the Gender Pay Gap*, Teen Vogue (Nov. 28, 2017), <https://www.teenvogue.com/story/women-sue-trump-gender-pay-gap> (piece authored by two DFF staff members).