

Exhibit 4

Privacy Office
Attn: FOIA Appeals
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0655
Washington, D.C. 20528-0655

April 7, 2020

FREEDOM OF INFORMATION ACT APPEAL

Re: Department of Homeland Security FOIA 2018-HQFO-01354

Dear FOIA Officer:

This is an appeal concerning the Department of Homeland Security's denial of my Freedom of Information Act request, number 2018-HQFO-01354, sent on August 9, 2018. The request asked for the following:

- All documentation used in formulating the press release, including program announcements, records generated at meetings, events, press conferences and/or interviews, and any other significant documentation used in formulating the release.
- Background material including background papers, news clippings, documents on program activities, reports on program and policy developments, news releases, fact sheets, and other reference material used in formulating the press release.
- All messages from senior leadership of the public affairs office to public affairs employees announcing new policies and revisions to existing policies from January 1, 2018 to the present.
- All correspondence between public affairs employees and reporters regarding the press release dated February 15, 2018 and located at this URL <https://www.dhs.gov/news/2018/02/15/we-must-secure-border-and-build-wall-make-america-safe-again>, from February 1, 2018 to the present.

The Agency's refusal to disclose the requested items violates the federal Freedom of Information Act. As the role of the Department of Homeland Security in securing the border is being actively and contentiously debated at this time, the disclosure of these documents stands to make a major contribution to the public's understanding of this divisive issue. Because irreversible decisions are being made with regard to the deportation of immigrants, the seizure of private property to make way for a border wall, the separation of immigrant families, and now, amid the coronavirus crisis, dramatically increased restrictions on border crossings, a quick resolution of this appeal is of extreme importance. Time is of the essence.

By letter dated March 27, 2020, nearly 20 months after my original request, Deputy Chief FOIA Officer James V.L.M. Holzer denied disclosure of the documents on the basis that the Agency

had posted them online (See the portion of the denial letter on page 1 that reads, "Information responsive to your request can be accessed online at <https://www.dhs.gov/publication/documents-related-february-2018-press-release-regarding-border-wall> accessed on March 27, 2020"). But for the subject lines and the top lines of the bodies of a handful of emails, the substance of all 24 pages of correspondence that the Agency published online is redacted. The Agency has blocked out the overwhelming majority of the bodies of the emails, citing exemption 5. What's more, in addition to officials' email addresses, entire names of some individuals involved in the exchange are redacted, citing exemption 6, and pages 7-9 are redacted entirely, meaning we don't even know what type of document(s) the Agency withheld.

I do not agree that the published materials satisfy my request, and I ask that any redacted portions be described in detail, specifying the statutory basis for the redactions as well as the FOIA office's reasons for believing that the alleged statutory justification applies in these instances. Taking the latter point first, the press release in question was the subject of numerous national news stories due to a popular online theory that the headline and wording of the release contained a secret meaning (see for example <https://www.buzzfeed.com/blakemontgomery/homeland-security-statement-theory> <https://lawandcrime.com/high-profile/twitter-explodes-after-homeland-security-headline-appears-to-mimic-14-words-neo-nazi-slogan/> <https://www.salon.com/2018/07/06/did-trump-administration-send-a-coded-signal-to-neo-nazis-maybe-not-but-is-that-reassuring/> <https://freebeacon.com/politics/journalists-spread-conspiracy-theory-dhs-document-contains-secret-nazi-code/> <https://www.businessinsider.com/conspiracy-theories-in-trump-era-political-arguments-2018-6>). The Agency's press office provided statements to reporters refuting this theory, and I requested such correspondence, and yet no correspondence between members of the press office and journalists appears in the material DHS published online.

As for the materials that are redacted in the published material, exemptions are cited, but otherwise no explanation is given for what the Agency deleted or why. It is by now well-established law that a plaintiff in a FOIA case is entitled to an index of the documents and/or portions of documents that have been withheld by the defendant agency. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Moreover, the description of the withheld material must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Dir. 1979). Of course, we are not in litigation now, but to avoid us ending up there, it would be helpful if the Agency provided such an index, should it choose to continue withholding certain portions of the requested documents.

To imply that the FOIA allows the withholding of all but a few dozen words from 24 pages of materials merely because a portion may be exempt from disclosure overlooks entirely the "segregable portions" clause of the Act. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt..." 5 U.S.C. § 552(b). The FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. I therefore request that I be

provided with all non-exempt portions which are reasonably segregable. I further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. The applicable section of the Code of Federal Regulations also includes the directive that: "In the event the records requested contain some portions which are exempt from mandatory disclosure and others which are not, the official responding to the request *shall insure that all nonexempt portions are disclosed*, and that all exempt portions are identified according to the specific exemption or exemptions which are applicable." 7 C.F.R. § 1.8(b), emphasis added.

I also believe that exemption 6 is being misapplied and that its use is not adequately explained in the Agency's response. Trentadue v. President's Council on Integrity & Efficiency, No. 03-CV-339, slip op. at 4 (D. Utah Apr. 26, 2004) states that an agency made no showing of privacy interest, so names of government employees should be released. Here, given the nature of the request and the un-redacted correspondence, it appears probable that the redacted names belong to government employees. The Agency makes no argument as to why privacy interest should apply here. Similarly, in Aguirre v. SEC, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) the court found, "Correspondence does not become personal solely because it identifies government employees." And in Cowdery, Ecker & Murphy, LLC v. Dep't of Interior, 511 F. Supp. 2d 215, 219 (D. Conn. 2007): "Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee's personal information, but not information related to job function."

On the other hand, if the names that are redacted do not belong to government employees, those people's involvement in some aspect of the public messaging around a major, contentious federal government policy is highly unusual and disclosure of their identities is in the public interest.

In conclusion, it appears that the Agency has acted arbitrarily and capriciously by redacting without explanation and apparently withholding at least the portion of the request related to communication with reporters about the press release. The elements of the requested documents that might arguably be withheld under exemptions 5 and 6 cannot prevent the release of the other materials requested. Further, even if some aspects of the request are within exemption 5, the Agency should use its discretionary powers to disclose the materials, because to do so would be within the public interest.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. As noted above, time is of the essence in this matter. If this appeal is denied or the Agency's response is not forthcoming within 20 working days I reserve my rights under FOIA to seek judicial review, including the award of attorney's fees. I await your prompt reply.

Thank you, and I hope you are safe and well.

All the best,

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