



May 2, 2017

VIA FOIAONLINE.REGULATIONS.GOV

U.S Customs and Border Protection

Re: Freedom of Information Act Request: Prototype Border Wall Construction

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

#### REQUESTED RECORDS

The Center requests from the U.S Customs and Border Protection (“CBP”) the following records:

1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (“NEPA”) environmental impact statements, environmental assessments, categorical exclusions, and/or other NEPA analysis prepared for “prototype” border wall construction as part of the border wall request for proposal (“RFP”) process. These prototypes will reportedly be constructed on federal land in San Diego County;
2. All other environmental analysis and/or compliance records prepared for prototype border wall construction, including but not limited to analysis conducted pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), Clean Water Act, 33 U.S.C. §§ 1251-1387 (“CWA”), and Coastal Zone Management Act, 16 U.S.C. 22 (“CZMA”); and
3. All inter- and intra-agency correspondence records mentioning, referencing and/or including reference to compliance with environmental and/or all other applicable laws relevant to prototype border wall construction.

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic

recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in the CBP's possession and control. If such records are no longer under the control of the CBP but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to the headquarters for the CBP with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

#### FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or; (2) for files that are in .pdf format, without any “portfolios” or “embedded files.” Portfolios and

embedded files within files are not readily accessible. Please do not provide the records in a single, or "batched," .pdf file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

### REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ... ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

#### I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "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 [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). CBP's regulations at 19 C.F.R. §§ 103.0-103.34 establish the same standard.

Thus, CBP must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "identifiable operations or activities of the federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure will "contribute to the understanding of a reasonably broad audience of persons interested in the subject," and (4) whether the disclosure is likely to enhance the public's understanding of the government operations and activities "to a significant extent." 6 C.F.R. § 5.11(k)(2)(i) – (iv). As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of CBP. This request asks for: (1) all National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (“NEPA”) environmental impact statements, environmental assessments, categorical exclusions, and/or other NEPA analysis prepared for “prototype” border wall construction as part of the border wall request for proposal (“RFP”) process. These prototypes will reportedly be constructed on federal land in San Diego County; (2) all other environmental analysis and/or compliance records prepared for prototype border wall construction, including but not limited to analysis conducted pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), Clean Water Act, 33 U.S.C. §§ 1251-1387 (“CWA”), and Coastal Zone Management Act, 16 U.S.C. 22 (“CZMA”); and (3) all inter- and intra-agency correspondence records mentioning, referencing and/or including reference to compliance with environmental and/or all other applicable laws relevant to prototype border wall construction.

This FOIA will provide the Center and the public with crucial insight into whether or not CBP has complied with environmental laws and regulations during prototype border wall construction. It is clear that building a prototype border wall between the United States and Mexico is a specific and identifiable activity of the government, in this case the executive branch agency, the CBP. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey information to the public about whether CBP is following environmental laws and regulations in relation to border wall prototypes, as part of the current border wall RFP process being conducted by CBP. The requested records will provide insight into how and whether CBP is carrying out its duties under environmental laws. Once the information is made available, the Center will analyze it and present it to its 1.3 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of the environmental impact of the proposed border wall between the United States and Mexico.

Thus, the requested records are likely to contribute to an understanding of CBP operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the Prototype Border Wall Construction and Compliance with Environmental Laws

The requested records will contribute to public understanding of how the prototypical border wall construction is consistent with the ESA, CWA, and CZMA. As explained above, the records will contribute to public understanding of the environmental consequences of building a border wall, and whether or not CBP is complying with existing laws that protect species, habitats, and water.

The decision to build a border wall between the United States and Mexico generally, and specifically whether CBP has complied with environmental laws and regulations during the prototypical border wall construction process, are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about whether CBP is abiding by environmental laws concerning the border wall prototype construction, which will occur on lands that belong to all Americans. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the ecological impact of the prototype border wall construction that are not currently in the public domain. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested documents “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”<sup>1</sup>

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of CBP compliance with environmental laws in relation to the prototypical border wall construction. The public is always well served when it knows how the government

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<sup>1</sup> In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about if and how federal agencies are performing their duties under the law while building a prototypical border wall.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of whether CBP is obeying applicable environmental laws and regulations in relation to border wall construction, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about the ecological threats a border wall will pose to endangered species and their habitats.

The records are also certain to shed light on CBP's compliance with NEPA, CWA, and CZMA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision-making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on the ecological impact of a border wall utilizing information obtained by the Center from federal agencies. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The

Center sends out more than 277 email newsletters and action alerts per year to more than 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have “liked” the Center on Facebook, and there are regular postings regarding the environmental consequences of erecting a border wall. The Center also regularly tweets to more than 52,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of CBP’s duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

### III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center’s role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.3 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

### IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee-waiver. We hope that CBP will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (971) 717-6409 or [foia@biologicaldiversity.org](mailto:foia@biologicaldiversity.org). All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



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