



December 16, 2019

Via Electronic Mail

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Re: FOIA Request

To whom it may concern:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552. This request is submitted on behalf of the American Civil Liberties Union of Texas and the ACLU Border Rights Center (“ACLU”).¹ The ACLU seeks information regarding the recently reported communications between the Department of Homeland

¹ ACLU, a 501(c)(3) organization, is dedicated to protecting and defending the individual rights and liberties guaranteed by the Constitution and laws. The ACLU monitors government conduct, provides free legal representation in civil rights and civil liberties cases, educates the public about their rights and liberties and abuses of power, and provides analyses to the public of government activities and their civil rights implications.

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Security (“DHS”), U.S. Customs and Border Protection (“CBP”), We Build the Wall Inc. (“WBW”), Fisher Industries, and American Eagle Brick Company.

I. Background

In early November 2019, WBW announced its intention to build 3.5 miles of border wall on the banks of the Rio Grande in southern Texas.² Concurrently with the announcement, the group brought heavy equipment to start work on private property near the town of Mission, Texas.³ Claiming that it would erect its wall within 20 feet of the river, WBW said the project would be “the first wall of its kind built in a floodplain.”⁴

This construction is prohibited by international law. Rivers like the Rio Grande move due to human and natural events, and the United States and Mexico have executed treaties to maintain the boundary between them if and when the Rio Grande changes course. The International Boundary and Water Commission (“IBWC”) is a federal agency designated by treaty to regulate construction on the floodplains of the Rio Grande. Its Commissioner, Jayne Harkins, was appointed by President Trump in 2018. To ensure that WBW’s construction does not cause the United States to breach its international obligations, IBWC asked WBW to suspend construction pending the submission of information.⁵ WBW threatened to defy the IBWC. Claiming support from the president’s son, DHS, and CBP, the group’s founder promised to persist: “Does it look like we were told stop? NOPE! Burning & Churning suckers.”⁶ On December 3, WBW threatened that “[t]his wall is going up this week no matter what.” The IBWC sought and was granted emergency relief restraining construction in federal court a few days later.⁷

On its website, WBW claims to have collected over \$25,000,000 in private donations, including 70% of the funds necessary toward wall construction in Hidalgo County and an unnamed “Project 3.” Notwithstanding WBW’s fundraising and countless public statements,⁸ it has sought to disclaim accountability, and in early December successfully sought dismissal from the IBWC’s lawsuit by representing in federal court that it is merely a “social media cheerlead[er]” for the construction company Fisher Industries.⁹

This representation muddies whether and how the intended wall will be financed.

² Gus Bova, “‘We Build the Wall’ Lands in South Texas, Vilifies Priest and Butterfly Refuge,” Texas Observer, Nov. 21, 2019, available at <https://www.texasobserver.org/we-build-the-wall-south-texas-vilifies-priest-butterfly-refuge/>.

³ See Kim Slowey, “Private group starts construction of another stretch of US-Mexico border wall,” Construction Dive, Nov. 20, 2019, available at <https://www.constructiondive.com/news/private-group-starts-construction-of-another-stretch-of-us-mexico-border-wa/567695/>.

⁴ We Build the Wall, Update Nov. 11, 2019, <https://webuildthewall.us/update/>.

⁵ Sandra Sanchez, “‘We Build the Wall’ issued cease and desist to stop construction in South Texas, officials confirm,” Fox 6, Nov. 19, 2019, available at <https://fox6now.com/2019/11/19/we-build-the-wall-issued-cess-and-desist-to-stop-construction-in-south-texas-officials-confirm/>.

⁶ Twitter, @BrianKolfage, Nov. 20, 2019, 7:41 AM.

⁷ “Court Grants Government’s TRO against Pro Wall Group,” The Monitor, Dec. 5, 2019, <https://www.themonitor.com/2019/12/05/citing-international-treaty-govt-sues-pro-wall-group-halt-construction/>.

⁸ E.g., We Build the Wall, Project 1: Before and After, <https://webuildthewall.us/>.

⁹ “US persuades judge to stop pro-Trump border wall group,” Fox Business, Dec. 6, 2019.

Fisher, for its part, was recently awarded its first contract to build border walls on behalf of the federal government, valued at \$400 million, and recent investigations reveal the group has spent more than \$100,000 on lobbying efforts to discuss the border wall with lawmakers since late 2017.¹⁰

Construction of a border wall generally, and erection of a massive structure on the floodplains of the Rio Grande, is destructive to border communities, neighboring landowners, and the environment.¹¹ By this FOIA request, ACLU seeks information about DHS's and CBP's communications with the ostensibly private wall builders and the contractor with which they are working.

To be clear, ACLU seeks information held by the government. The public has a right to know whether and how DHS is engaging with groups seeking to build border walls that Congress did not authorize.

Several recent reports allude to this engagement. For example, on November 20, 2019, Acting DHS Secretary Chad Wolf and El Paso Border Patrol Chief Gloria Chavez made an unpublicized visit to the site of WBW's first and only completed project, a half-mile stretch of steel bollard fencing built without required permits in Sunland Park, New Mexico.¹² A DHS spokesperson confirmed that Secretary Wolf visited the owner of the property and an engineer from Fisher.¹³ WBW proclaims on its website that it has received "MAJOR Endorsement from DHS Secretary Chad Wolf and CBP Chief," and that the unannounced visit is only one of several conversations between DHS, CBP, and WBW. According to WBW's founder, WBW has been in communication with officials at DHS for several months; including at least one meeting in Washington between members of WBW's board and Secretary Wolf before Secretary Wolf visited Sunland Park.¹⁴

In December, Fisher Industries, which was not among the companies the Army Corps of Engineers initially selected as qualified bidders on nearly \$10 billion in contracts for border barrier construction, was awarded a \$400 million border wall contract.¹⁵ Tommy

¹⁰ "Contract for stretch of Arizona border wall raises concerns of improper influence, Arizona Daily Star (Dec. 7, 2019), https://tucson.com/news/local/contract-for-stretch-of-arizona-border-wall-raises-concerns-of/article_c5083a5f-717a-57dc-88b1-108e178bec75.html.

¹¹ 2019 Update—Death, Damage, and Failure: Past, Present, and Future Impacts of Walls on the U.S.-Mexico Border, ACLU, Dec. 2, 2019, <https://www.aclutx.org/en/ddf2019>.

¹² Caitlin Dickson, "Exclusive: Acting Homeland Security chief Chad Wolf makes unannounced visit to privately funded border wall," Yahoo News, November 21, 2019, available at <https://news.yahoo.com/acting-homeland-security-chief-chad-wolf-makes-unannounced-visit-to-privately-funded-border-wall-223803492.html>; Nick Miroff, "Right-wing group continues to build private border wall. It lacks permits, but not official praise," The Washington Post, Nov. 22, 2019, available at https://www.washingtonpost.com/immigration/right-wing-group-continues-to-build-private-border-wall-it-lacks-permits-but-not-official-praise/2019/11/22/b4281676-0c71-11ea-8397-a955cd542d00_story.html.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ Nick Miroff, "House committee chair calls for investigation into \$400 million border wall contract," Washington Post, Dec. 4, 2019, available at <https://www.washingtonpost.com/immigration/house-committee-chair-calls-for->

Fisher, President and CEO of Fisher Industries, has made repeat appearances on Fox News and elsewhere, enlisted Sen. Kevin Cramer (R-N.D.) to personally lobby the president, and the president has repeatedly promoted Fisher's company to the U.S. Army Corps of Engineers.¹⁶ Fisher Industries has also reportedly paid lobbyists more than \$100,000 to engage lawmakers about the border wall,¹⁷ and the *Washington Post* reports that "[p]resident Trump has repeatedly pushed for Fisher to get a wall-building contract."¹⁸

These efforts raise serious concerns about how available funds are allocated and whether and how the ostensibly private wall projects relate to Fisher's selection for the \$400 million contract.

II. Requested Records

By this Request, the ACLU seeks:

1. All records¹⁹ of communication received from or transmitted to WBW by DHS and/or CBP. This Request includes such records of communication from or transmitted to all persons representing WBW, including but not limited to founder Brian Kolfage, Stephen K. Bannon, John Daniel Moran, Jr., Dr. Robert S. Spalding III, Brig Gen, USAF (Ret), Erik Prince, Curt Schilling, Tom Tancredo, David Alexander Clarke Jr., Kris Kobach, Mary Ann Mendoza, Steve Ronnebeck, Dustin Stockton, Tiffany Ruegner, Jennifer Lawrence, Amanda Shea, and/or any WBW advisory board members, staff, contractors, or subcontractors.
2. All records received from or transmitted to Fisher Industries and its affiliates by DHS and/or CBP related to the Sunland Park or Rio Grande Valley projects, including planning and/or coordination, execution, and financing of these projects, technical, environmental, or regulatory obligations or compliance/noncompliance therewith. Such request includes records of communication between DHS and/or CBP and all persons working with Fisher Industries, including but not limited to Fisher Sand & Gravel and American Eagle Brick Company and its affiliates.

investigation-into-400-million-border-wall-contract/2019/12/04/368e8a20-16bb-11ea-a659-7d69641c6ff7_story.html.

¹⁶ *Id.*

¹⁷ Curt Prendergast, "Contract for stretch of Arizona border wall raises concerns of improper influence," *Arizona Daily Star*, Dec. 7, 2019, available at https://tucson.com/news/local/contract-for-stretch-of-arizona-border-wall-raises-concerns-of/article_c5083a5f-717a-57dc-88b1-108e178bec75.html.

¹⁸ "North Dakota company that Trump touted gets \$400 million border wall contract," *Washington Post*, Dec. 2, 2019, https://www.washingtonpost.com/immigration/north-dakota-company-that-trump-touted-gets-400-million-border-wall-contract/2019/12/02/9c661132-1568-11ea-bf81-ebe89f477d1e_story.html.

¹⁹ The term "records" as used in this request and in request number 2 includes, but is not limited to, all communications, data, and information preserved in physical or electronic (digital) formats, including but not limited to advisories, agreements, analyses, audio, calendar invitations, appointments, or reminders, contracts, correspondence, documents, e-mails, evaluations, faxes, files, guidelines, instructions, memoranda, memoranda of understanding, minutes of meetings or calls, notes, orders, policies, procedures, protocols, regulations, reports, rules, social-media posts, studies, technical manuals, text messages (SMS or other platforms), training manuals, or video.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552 (a)(6)(E).²⁰ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. 552(a)(6)(E)(v)(II).

Both the ACLU and the Border Rights Center are “primarily engaged in disseminating information” within the meaning of the FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II). See also 6 C.F.R. § 5.5(e)(1)(ii). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).²¹ We do this work alone and with our national partners and allies. The ACLU of Texas, which houses the Border Rights Center, regularly creates and disseminates works in the form of presentations, reports, articles, interviews, testimony, social media, and blog posts to educate the public about the activities of the United States government.²² The ACLU of Texas also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and civil liberties.²³

These records are urgently needed to inform the public about actual or alleged government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁴ Specifically, as discussed above, the requested records seek to inform the public DHS’s potential support of privately funded groups building border walls on the Southwest border.

Pursuant to the applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. See 5 U.S.C. § 552(a)(6)(E)(ii); C.F.R. § 5.5(e)(4).

In addition, ACLU is entitled to a waiver or reduction of fees because disclosure of the requested 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 disclosure of the information is not primarily in the commercial interest of the requester. See 5 U.S.C. § 552(a)(4)(A)(iii). Several outlets have reported with interest on the developing construction of border walls by WBW and the group’s relationship with

²⁰ See also 6 C.F.R. § 5.5(e)(1).

²¹ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” See, e.g., *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

²² See generally *Immigrant Rights*, ACLU Tex., <https://www.aclutx.org/en/issues/immigrants-rights/>.

²³ See generally *Know Your Rights*, ACLU Tex., <https://www.aclutx.org/en/know-your-rights/>.

²⁴ See also 6 C.F.R. § 5.5(e)(1)(ii).

United States DHS
United States CBP

the current administration. *E.g., Right-wing group continues to build private border wall. It lacks permits, but not official praise*, WASH. POST, Nov. 22, 2019. DHS and CBP's demand for a border wall, and the means by which they construct one, are the source of considerable public discussion and debate. Accordingly, transparency regarding DHS and CBP's relationship with WBW and its affiliates, which includes as advisors several persons currently or formerly affiliated with the executive branch, is vital to the public interest.

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific FOIA exemptions. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information.

Thank you for your prompt attention to this matter. Please furnish the applicable records to the below signed.

We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees. Please provide documents in digital form wherever possible.

Thank you for your prompt attention to this matter.

Sincerely,



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