

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENISE GILMAN
4105 Avenue H
Austin, TX 78751

Plaintiff,

v.

C. A. No. _____

U.S. DEPARTMENT OF HOMELAND
SECURITY
245 Murray Drive SW
Washington, DC 20528-0550

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

and

U.S. ARMY CORPS OF ENGINEERS
441 G Street, NW
Washington, DC 20314

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the production of records concerning the construction of a Texas-Mexico border wall as part of the Department of Homeland Security’s implementation of the Secure Border Initiative. The border-wall plan has garnered widespread public and media interest, and the requested documents would shed light on the agency’s planned locations for constructing

border-wall segments, criteria for deciding those locations, and assessments of potential impacts on various communities along the border.

JURISDICTION

2. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Denise Gilman is a Clinical Professor at the Immigration Clinic at the University of Texas School of Law. She is a member of the University of Texas Working Group on Human Rights and the Border Wall (“Working Group”), which has been studying the effects of the construction of a fence or wall on the Texas-Mexico border. As part of her work, she and other members of the Working Group have prepared a series of reports analyzing the human-rights impacts of the border wall. Those reports were submitted, in conjunction with Plaintiff’s live testimony at a public hearing, for consideration by the Inter-American Commission on Human Rights at the Organization of American States. The reports are also available online at <http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/briefing-papers.html>.

4. Defendants U.S. Department of Homeland Security (“DHS”), U.S. Customs and Border Protection (“CBP”), and U.S. Army Corps of Engineers (“ACE”), are agencies of the United States government and have possession of and control over the records Plaintiff seeks.

FACTS

Plaintiff’s FOIA Requests

5. In 2006, Congress passed the Secure Fence Act, which mandated construction of a fence or wall along specific portions of the U.S.-Mexico border, including areas in Texas. Pub.

L. No. 109-367, 120 Stat. 2638 (2006). Later, in the Consolidated Appropriations Act, FY 2008, Congress amended the mandate to include 700 miles of fencing, 370 miles of which were to be completed by the end of 2008. Pub. L. 110-161, 121 Stat. 1844 (2007). Notably, the new provisions did not indicate where the fence was to be built; all discretion was left to DHS. The only limitation placed on DHS was a requirement that it consult with states, local governments, Indian tribes, and property owners, and that alternatives to physical fencing be considered. Although the construction was due to move forward very quickly, obtaining information about planned locations for wall segments from DHS proved very difficult for community members. Initial maps, created as part of draft environmental impact statements, were available online, but were removed from the CBP website and repeatedly disclaimed by the agency as being outdated. Without knowing the planned locations for segments of border wall, it is very difficult for the Working Group to study the wall's impact on border communities, the border environment, or individual landowners. Moreover, what little is known about the proposed locations of border-wall segments has already sparked public interest and led to debate about border wall construction. For instance, when one segment of the wall was slated to disrupt the University of Texas at Brownsville campus, community outrage was widely reported in newspapers and other media. CBP also has not made public the criteria it uses for deciding whether a wall segment will be placed on a piece of property. Researchers have found statistically significant differences between the income and race of property owners whose land will be affected by the wall versus those whose land will remain unaffected. Affected property owners are, on average, less wealthy and include more people of color than property owners whose land will not be affected. Anecdotal evidence also supports this conclusion. Public commentators have noted that the wall

is planned such that it will skip over a wealthy country club property on the border, while having a devastating impact on some poorer communities and Native American communities.

6. By separate letters dated April 11, 2008, Plaintiff submitted FOIA requests to DHS, CBP, and ACE's Fort Worth District. The FOIA requests sent to DHS and CBP were identical to one another, and the request to ACE contained minor, non-substantive differences. The request as sent to DHS and CBP is set forth in the following numbered, indented paragraphs (with brackets denoting words not included in the DHS and CBP requests but used in the ACE request):

1. Maps of possible locations for segments of fence or wall along the Texas/Mexico border. This request specifically includes all of the maps that were used or presented by the United States government at the hearings held on March 19, 2008 in connection with condemnation actions for [affecting] property along the Texas/Mexico border. These hearings were held in the United States District Court for the Southern District of Texas – Brownsville. According to statements of representatives of the government at the hearings, these maps reflected the latest proposed route for the fence or wall along the Texas/Mexico border.
2. Documents or electronic files including geographic coordinates (e.g. latitude and longitude) for surveyed points along potential routes for segments of fence or wall along the Texas/Mexico border.
3. Documents identifying the properties possibly affected by the construction of the border fence or wall along the Texas/Mexico border, including documents that provide information regarding the ownership of the possibly affected properties and any other information about the characteristics of those properties.
4. Documents identifying the properties for which the United States government has sought to obtain access through consent/waiver or through litigation. This request includes documents that reflect when and how access was sought and what type of access was sought as well as documents that reflect whether access has been granted and which properties the government has physically accessed to date for surveying or any other purpose.
5. Documents reflecting appraisals of properties possibly affected by the construction of the border fence or wall along the Texas/Mexico border.
6. Documents reflecting surveys or other analyses of the areas possibly affected by the border fence or wall along the Texas/Mexico border. This request includes any analyses

or research conducted on the [potential] impact on Native American individuals or communities. It also includes any analyses or research conducted on the [potential] impact on businesses, individuals or communities that have a presence on both sides of the Texas/Mexico border or who regularly travel back and forth across the border. Finally, it includes analyses or research conducted on the treaty and land grant history of the properties and individuals possibly impacted by the border fence or wall along the Texas/Mexico border.

7. Documents that describe the considerations or factors taken into account in making decisions regarding potential routes for segments of fence or wall along the Texas/Mexico border.
8. Communications received from, provided to or referenced by the Department of Homeland Security that make recommendations or suggestions regarding the route for segments of fence or wall along the border along the Texas/Mexico border.
9. Documents relating to potential or actual contracts for the execution of land surveys or construction of segments of fence or wall along the Texas/Mexico border. The requested documents include requests for proposals or bids, responses to requests for proposals or bids, contracts, inquiries regarding potential contracts and negotiations regarding contracts.

DHS's Referral of Plaintiff's Request

7. By letter dated May 1, 2008, and signed by Vania T. Lockett, Associate Director, Disclosure & FOIA Operations, DHS referred Plaintiff's request to Mark Hanson, FOIA Officer for CBP, "since CBP will likely possess the records [Plaintiff] requested." DHS also provided Plaintiff with the reference number DHS/OS/PRIV 08-493/Gilman for her request.

8. By letter dated November 3, 2008, and signed by Plaintiff, Plaintiff requested that she be advised before any fees were incurred above \$25.00.

9. Under 5 U.S.C. § 552(a)(6)(A)(i), DHS had 20 working days to respond to Plaintiff's request. More than 20 working days have passed since Plaintiff's April 11 request, and Plaintiff has not received any further response, nor has DHS produced any materials in response to her request.

10. Plaintiff has exhausted all administrative remedies with respect to her FOIA request to DHS. *See* 5 U.S.C. § 552(a)(6)(C)(i).

11. Plaintiff has the statutory right to the records she seeks, and DHS has no legal basis for failure to disclose them.

CBP's Failure to Timely Comply with Plaintiff's Request and Administrative Appeal

12. By letter dated May 19, 2008, and signed by Rita A. Williams, Assistant Director, Acquisition Policy and Contract Operations/SBI Acquisition Office, CBP advised Plaintiff that “it was determined that responsive records contain information that DHS has reason to believe may be protected from disclosure under FOIA Exemption 4 as confidential business information” and that, as a result, the agency must provide pre-disclosure notification to the submitter of business information under DHS FOIA regulations, 6 C.F.R. § 5.8(f). Thus, CBP stated, Plaintiff “should anticipate some delay in receiving a final response” to her request.

13. By emails dated August 12, 2008, addressed to Tierney Davis (a CBP employee identified in the May 19 correspondence), and Rita A. Williams, Plaintiff requested information as to the status of the FOIA request.

14. By emails dated August 13, 2008, and August 14, 2008, from Rita A. Williams, Plaintiff was informed that her request had been transferred to Craig Lowenstein for processing and that he would be in touch with Plaintiff.

15. By phone call on October 21, 2008, from Susan Buchanan, a CBP employee, Plaintiff was informed that her request was still in processing.

16. By letter dated November 3, 2008, and signed by Plaintiff, Plaintiff requested that she be advised before any fees were incurred above \$25.00.

17. By phone call on November 19, 2008, from Susan Buchanan, and confirmed by email sent the same day by Ms. Buchanan, Plaintiff agreed to CBP's request that she limit the scope of "Item 1 of [her] request to mean: copies of the original maps and current maps, concerning fence placement along the U.S./Mexico border." She also agreed that email searches could be limited to emails that "key SBI officials currently have on their systems, not to include involving our Office of Information Technology removing items from the server." CBP agreed to provide Plaintiff with "copies of DHS/CBP agreements with the U.S. Army Corps of Engineers to construct a fence along the border." Finally, CBP and Plaintiff agreed that items 2-9 of Plaintiff's request remained unchanged. Plaintiff also was assured that her request was still being processed. Plaintiff returned an email confirming those agreements on November 24, 2008.

18. By phone call on December 11, 2008, from Susan Buchanan, Plaintiff was informed that CBP would be releasing some documents the following week, but that ACE would be releasing most documents responding to her request on an unknown timetable.

19. By email on December 18, 2008, from Susan Buchanan, Plaintiff received "an initial and partial response" to her FOIA request, with two documents attached: the first was labeled "Base Contract Award" and the second "Solicitation Admin Mod 7." These documents were responsive to Plaintiff's request for contracts relating to the construction of the border wall. CBP redacted these records, citing FOIA exemptions (b)(4), (b)(5), (b)(6), and (b)(7)(e). 5 U.S.C. §§ 552(b)(4), (b)(5), (b)(6), & (b)(7)(e). The email also stated that CBP believed "that the U.S. Army Corps of Engineers may also have documents responsive to [Plaintiff's] request," and provided an address at which Plaintiff could submit a request to ACE. Finally, the email

stated that the “other portions of your request are in process, and we expect to have an update on the other portions of your request by January 30, 2009.”

20. By letter dated December 23, 2008, Plaintiff submitted an appeal of the partial denial of her request. In that letter, she challenged the redactions of the two documents that were released and the referral to ACE, to the extent that it constituted a denial.

21. By phone message recorded on January 30, 2009, from Susan Buchanan, Plaintiff was informed that her request was still being processed.

22. Under 5 U.S.C. § 552(a)(6)(A)(i), CBP had 20 working days to respond to Plaintiff’s request. More than 20 working days have passed since Plaintiff’s April 11 request and Plaintiff has only received a partial response (two documents) to her request.

23. Under 5 U.S.C. § 552(a)(6)(A)(ii), CBP had 20 working days to respond to Plaintiff’s appeal challenging the redactions and the referral to ACE. More than 20 working days have passed since Plaintiff’s December 23, 2008, appeal, and Plaintiff has not received a response to her appeal, nor has CBP produced any additional materials in response to her appeal.

24. Plaintiff has exhausted all administrative remedies with respect to her FOIA request to CBP. *See* 5 U.S.C. § 552(a)(6)(C)(i).

25. Plaintiff has the statutory right to the records she seeks, and CBP has no legal basis for failure to disclose them.

ACE’s Denial of Plaintiff’s Request and Partial Denial of Plaintiff’s Administrative Appeal

26. By letter dated May 6, 2008, and signed by Delene R. Smith, Alternate Freedom of Information Act Officer, ACE’s Fort Worth District advised Plaintiff that the estimated cost of reproduction of the documents responsive to her request was \$54,545.55, and recommended reducing the cost by narrowing her request.

27. Following a telephone conversation with Delene R. Smith and Jason B. Tackett at ACE's Fort Worth District about how appropriately to narrow her request, Plaintiff, by email dated May 12, 2008 and addressed to those same individuals, narrowed her request as set forth in the following numbered, indented paragraphs:

1. Maps, GPS coordinates or descriptions setting forth the original fence alignments (locations) for the Texas/Mexico border set out by the Secure Border Initiative at the Department of Homeland Security and conveyed to the US Army Corps of Engineers.
2. Current maps (as of this month if possible) setting forth the current alignment/locations for the properties to be impacted by the fence as per these maps. As we discussed, it would be most helpful to have both a statewide map of the proposed locations for the border wall in Texas AND a set of maps that demonstrates fence locations for each individual Border Patrol sector. If it is not possible to copy both sets of maps, or if it is very costly, I would at least like to obtain the statewide map for Texas for the border fence. If it is not possible for you to provide "current" maps, I would seek a recent set of maps. For example, if it is not possible to provide maps developed this month, I would request the set of maps used by the United States government at the hearing in federal District Court in Brownsville, Texas on March 19, 2008.
3. Task orders already awarded for construction of fence segments along the Texas/Mexico border.
4. Surveys, analyses or other documents reflecting implementation of the Secure Fence Act as it affects Native American communities or lands.
5. Documents reflecting the decision-making process that led to a conclusion that fencing should not be constructed on the following properties: 1) River Bend Resort, 4541 US Highway 281, Brownsville, TX 78520; 2) Property owned by Ray L. Hunt and his relatives, all or most of which is known as Sharyland Plantation, located in or near Hidalgo County, Texas; 3) Properties in the City of Eagle Pass along the border wall trajectory where fencing is not scheduled to be built (other areas of Eagle Pass are scheduled to be sites of construction).

28. By letter dated May 28, 2008, and signed by Delene R. Smith, ACE's Fort Worth District informed Plaintiff that she would receive a response no later than June 25, 2008.

29. By letter dated June 25, 2008, and signed by Rex Crosswhite, District Counsel, ACE's Fort Worth District denied Plaintiff's request. It asserted that as to items 1, 2, and 5 on Plaintiff's narrowed request, "[a] search of the records within the Fort Worth District shows that

[those] items . . . are not U.S. Army Corps of Engineers documents and must, therefore, be requested from the official record owner, the Secure Border Initiative at the Department of Homeland Security.” Additionally, as to Item 2, ACE asserted that the information can “be retrieved from the Federal District Court [at which] you stated the hearing was held in Brownsville, Texas on March 19, 2008,” and that FOIA does not require ACE “to release documents that are publicly recorded or are already in the public realm.” As to item 3, ACE stated that “to date, no task orders have been awarded for construction of fence segments along the Texas-Mexico border.” As to item 4, the agency stated that “there are no affected tribal reservation lands in Texas,” and that, therefore, there were no responsive documents.

30. By letter dated August 13, 2008, Plaintiff appealed the denial of her request, noting that FOIA “does not limit the obligation to disclose a particular record only to one agency deemed ‘official record owner’” and that the records ACE’s Fort Worth District asserted could be obtained from the Federal District Court in Brownsville, Texas, were not, in fact, available at that location. Moreover, Plaintiff pointed out that ACE’s original response, containing an estimated cost of document reproduction in response to her request, demonstrated agency control over those documents. Finally, Plaintiff stated that ACE had not been responsive to the request for documents reflecting analyses of the impact of the border wall on Native American communities or lands, but answered only as to tribal reservations.

31. By letter dated November 3, 2008, and signed by Plaintiff, Plaintiff requested that she be advised before any fees were incurred above \$25.00.

32. After receiving an indication from CBP that ACE intended to produce documents, on December 9, 2008, Plaintiff called Delene R. Smith at ACE’s Fort Worth District, who

maintained that the documents were CBP documents and indicated that ACE did not intend to release any documents.

33. By telephone call in mid-January from Delene R. Smith, Plaintiff was informed that ACE's Fort Worth District would try to release some documents, but that CBP had control over most of the documents responsive to Plaintiff's request.

34. By letter dated January 29, 2009, and signed by Rex Crosswhite, District Counsel, ACE's Fort Worth District responded to Plaintiff's appeal. In this response, ACE's Fort Worth District released fourteen documents pertaining to item #3 of Plaintiff's revised request (task orders), and one document pertaining to item #1 of her revised request (map of original fence locations). It also deemed thirteen additional documents suitable for referral. The letter stated that ACE's Fort Worth District referred eight documents it located responsive to Plaintiff's request to CBP, and another five documents to ACE's Southwestern District. No other documents beyond these twenty-eight were mentioned in the response to Plaintiff's appeal.

35. By letter dated February 19, 2009, and signed by Eugene Kastanek, Assistant Division Counsel, ACE's Southwestern Division responded to Plaintiff's appeal and the referral it received related thereto. In this response, ACE released 69 pages of documents but continued to withhold substantial portions of those documents, citing exemption 6 of FOIA. *See* 5 U.S.C. § 552(b)(6). The letter stated that "no public interest as to the agency's performance would be gained by the release of the identity of the property owners, real estate, or plat information" that was redacted, and that "such a release would constitute a clearly unwarranted invasion of the privacy rights of those citizens."

36. On appeal, ACE has upheld in part the denial of records to Plaintiff. Plaintiff has exhausted all administrative remedies with respect to her FOIA appeal to ACE. *See* 5 U.S.C.

§ 552(a)(6)(A)(ii).

37. Plaintiff has the statutory right to the records she seeks, and ACE has no legal basis for failure to disclose them.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff requests that this Court

- A) Declare that Defendants' failure to disclose records requested by Plaintiff is unlawful;
- B) Order Defendants to make all the requested records available to Plaintiff;
- C) Award Plaintiff her costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- D) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,



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Dated: March 11, 2009