

LEGAL DEPARTMENT



January 23, 2018

Federal Bureau of Investigation  
Attn: FOI/PA Request  
Record/Information Dissemination Section  
170 Marcel Drive  
Winchester, VA 22602-4843  
Fax: (540) 868-4391/4997  
Email: foiparequest@ic.fbi.gov

Melissa Golden (née Kassier)  
Lead Paralegal and FOIA Specialist  
Office of Legal Counsel  
Room 5511, 950 Pennsylvania Avenue, N.W.  
Department of Justice  
Washington, DC 20530-0001  
Fax: (202) 514-2053  
Email: usdoj-officeoflegalcounsel@usdoj.gov

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT B. REMAR  
TREASURER

OSD/JS FOIA Requester Service Center  
Office of Freedom of Information  
1155 Defense Pentagon  
Washington, DC 20301-1155  
Fax: (571) 372-0500

Nicole Barksdale-Perry (Acting)  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655  
Fax: (202) 343-4011  
Email: foia@hq.dhs.gov

U.S. Army Humphreys Engineer Support Center  
Attention: CEHEC-OC  
7701 Telegraph Road  
Alexandria, Virginia 22315-3860  
Fax: (703) 428-7633

National FOIA Office  
Bureau of Land Management  
Attn: FOIA Office (WO-640)

USA\_ACE\_000001

1849 C St. N.W.  
Washington, DC 20240  
Fax: (202) 245-0050  
Email: blm\_wo\_foia@blm.gov

**Re: Request Under Freedom of Information Act  
(Expedited Processing & Fee Waiver Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)<sup>1</sup> submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline.

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**I. Background**

On January 27, 2017, the White House released its Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, which expedited the approval process for the Canada-to-Texas oil pipeline that President Barack Obama had previously rejected.<sup>2</sup> Two months later, President Donald Trump announced that his administration had formally approved the pipeline.<sup>3</sup>

These decisions generated intense public controversy and debate. The president’s approval of the Keystone XL Pipeline set the stage for renewed protest against oil pipelines, which activist groups say accelerate climate change,

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<sup>1</sup> The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> See Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/>; Elise Labott & Dan Berman, *Obama Rejects Keystone XL Pipeline*, CNN (Nov. 6, 2015), <http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/index.html>.

<sup>3</sup> Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN (Mar. 24, 2017), <http://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html>.

threaten clean water reserves, and invade cultural sites of American Indian tribes.<sup>4</sup> In response to the president's announcement, then-chairman of the Standing Rock Sioux tribe, David Archambault II, stated, "We opposed Keystone before, and we'll oppose it again."<sup>5</sup> Environmental groups, too, have made clear their intention to protest Keystone XL's construction; one prominent group has invited advocates to sign a "Pledge of Resistance," which includes a commitment to "participate in peaceful direct action that may result in my arrest, should construction begin on the Keystone XL pipeline."<sup>6</sup>

Government officials have consequently made clear their intention to prevent a repeat of the prolonged protests against the Dakota Access Pipeline, which drew thousands of activists to the North Dakota site, sparked physical confrontation with law enforcement authorities, and captured worldwide attention.<sup>7</sup> Officials have pursued numerous strategies for impeding these protests, such as asking the federal government for guidance on the possibility of prosecuting protestors under domestic terrorism laws,<sup>8</sup> enacting legislation that allows a governor or sheriff to prohibit groups numbering more than 20 from gathering on public land,<sup>9</sup> and fostering cooperation between federal, state, and local law enforcement entities and private security contractors.<sup>10</sup> As a

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<sup>4</sup> Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, National Geographic (Jan. 25, 2017), <https://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/>.

<sup>5</sup> Stand with Standing Rock, *Standing Rock Sioux Chairman Responds to Keystone Pipeline Permit Approval* (Mar. 24, 2017), <http://standwithstandingrock.net/standing-rock-sioux-chairman-responds-keystone-pipeline-permit-approval/>.

<sup>6</sup> Bold Alliance, *Sign the Keystone XL Pledge of Resistance* (last visited Dec. 27, 2017), [https://boldalliance.webaction.org/p/dia/action3/common/public/?action\\_KEY=20257](https://boldalliance.webaction.org/p/dia/action3/common/public/?action_KEY=20257); see also Michael McLaughlin, *Keystone XL Protesters Won't Back Down After Trump Approval*, Huffington Post (Mar. 24, 2017), [https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval\\_us\\_58d55333e4b02a2eaab3819e](https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval_us_58d55333e4b02a2eaab3819e).

<sup>7</sup> See, e.g., Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World-Herald (Apr. 11, 2017), [http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article\\_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html](http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html).

<sup>8</sup> Timothy Gardner, *U.S. Lawmakers Ask DOJ If Terrorism Law Covers Pipeline Activists*, Reuters (Oct. 23, 2017), <https://www.reuters.com/article/us-usa-pipelines-activism/u-s-lawmakers-ask-doj-if-terrorism-law-covers-pipeline-activists-idUSKBN1CS2XY>.

<sup>9</sup> South Dakota Senate Bill 176 (Mar. 27, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/03/SB-176.pdf>.

<sup>10</sup> Alleen Brown, *Nebraska Approves Keystone XL Pipeline as Opponents Face Criminalization of Protests*, The Intercept (Nov. 20, 2017), <https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/>; *Lincoln Police Prepare for All Scenarios as Pipeline Protests Near*,

further threat to activists who may wish to repeat their actions at the Dakota Access Pipeline, the *Guardian* reports that Joint Terrorism Task Force agents have attempted to contact multiple individuals involved with the North Dakota anti-pipeline movement.<sup>11</sup>

Evidence of cooperation among law enforcement officials and private corporations in the area of oil pipeline protests has been widely documented. On May 27, 2017, *The Intercept* published internal documents of the security firm TigerSwan that revealed close cooperation between TigerSwan, state police forces, and federal law enforcement in at least five states around the Dakota Access Pipeline.<sup>12</sup> For example, a TigerSwan situation report on March 29, 2016 explicitly named the state and federal actors in attendance at a joint meeting the day before: “Met with the Des Moines Field Office of the FBI, with the Omaha and Sioux Fall offices joining by conference call. Also in attendance were representatives of the Joint Terrorism Task Force, Department of Homeland Security . . . Topics covered included the current threat assessment of the pipeline, the layout of current security assets and persons of interests. The FBI seemed were [sic] very receptive . . . follow-up meetings with individuals will be scheduled soon[.]”<sup>13</sup> *The Intercept* also published communications detailing coordination “between a wide range of local, state, and federal agencies,” including the revelation that the FBI participated in law enforcement operations related to the Dakota Access Pipeline protests.<sup>14</sup> Finally, a review of federal lobbying disclosure forms by *DeSmog*, a blog focused on topics related to climate change, has revealed that the National Sheriffs’ Association was

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1011 Now (Aug. 1, 2017), <http://www.1011now.com/content/news/Lincoln-Police-prepare-for-all-scenarios-as-pipeline-protests--437938853.html>.

<sup>11</sup> Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, *The Guardian* (Feb. 10, 2017), <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access>.

<sup>12</sup> Alleen Brown, Will Parrish, and Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies”*, *The Intercept* (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

<sup>13</sup> Alleen Brown, Will Parrish, and Alice Speri, *TigerSwan Responded to Pipeline Vandalism by Launching Multistate Dragnet*, *The Intercept* (Aug. 26, 2017), <https://theintercept.com/2017/08/26/dapl-security-firm-tigerswan-responded-to-pipeline-vandalism-by-launching-multistate-dragnet/>.

<sup>14</sup> Brown, Parrish & Speri, *Leaked Documents Reveal Counterterrorism Tactics; see also Intel Group Email Thread*, *The Intercept* (May 27, 2017), <https://theintercept.com/document/2017/05/27/intel-group-email-thread/> (documenting FBI participation in law enforcement operations around the Dakota Access Pipeline protests).

lobbying Congress for surplus military gear and on issues related to the Dakota Access Pipeline.<sup>15</sup>

Law enforcement officials have signaled that such cooperation will assist them in responding to future protests against Keystone XL and other oil pipelines. For example, on April 11, 2017, the *Omaha Herald* reported that Morton County, North Dakota Sheriff Kyle Kirchmeier, whose department was involved in responding to the Dakota Access Pipeline protests, has been in communication with other states over how to respond to oil pipeline protestors.<sup>16</sup>

Such indications and the recent existence of cooperation on this exact issue raise important questions about federal agencies' level of collaboration with state and local governments and with private security contractors in connection with oil pipeline protest actions. These questions are especially important given the uncertainty around whether and to what extent the government was engaged in surveillance of Dakota Access Pipeline protestors.<sup>17</sup> The First Amendment protects political speech from the threat of undue government scrutiny, and the extent of such scrutiny is currently unknown.<sup>18</sup>

To provide the American public with information about federal cooperation with state and local governments and with private security contractors over possible oil pipeline protests, the ACLU seeks such information through this FOIA request.

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## II. Requested Records

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<sup>15</sup> Steven Horn & Curtis Waltman, *In Heat of Dakota Access Protests, National Sheriffs' Association Lobbied for More Military Gear*, DeSmog (Apr. 27, 2017), <https://www.desmogblog.com/2017/04/27/dakota-access-sheriffs-lobbying-military-gear>.

<sup>16</sup> Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World Herald (Apr. 11, 2017), [http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article\\_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html](http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html).

<sup>17</sup> Alyssa Newcomb, Daniel A. Medina, Emmanuelle Saliba, and Chiara A. Sottile, *At Dakota Pipeline, Protestors Questions of Surveillance and 'Jamming' Linger*, NBC (Oct. 31, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-questions-surveillance-jamming-linger-n675866>; Morgan Chalfant, *ACLU Challenges Warrant to Search Facebook Page of Dakota Access Opponents*, The Hill (Mar. 9, 2017), <http://thehill.com/policy/cybersecurity/323131-aclu-challenges-police-effort-to-search-facebook-page-of-dakota-access>.

<sup>18</sup> See Motion to Quash Search Warrant, American Civil Liberties Union, *In Re Search Warrant No. 17A03639 Served On Facebook* at 5 (filed Mar. 8, 2017), [https://www.aclu.org/sites/default/files/field\\_document/motion\\_to\\_quash\\_-\\_filed.pdf](https://www.aclu.org/sites/default/files/field_document/motion_to_quash_-_filed.pdf).

With respect to **all agencies** listed above, the ACLU seeks the release of all records<sup>19</sup> created since January 27, 2017, concerning:

(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and

(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

With respect to the **Office of the Secretary of Defense**, the ACLU seeks the release of all records created since January 27, 2017, concerning:

(5) Purchases, requests for purchase, and requests by state and local law enforcement officials of riot gear, including but not limited to tear gas, concussion grenades, and water cannons, from the U.S. Department of Defense's Law Enforcement Support Office, also known as the 1033 program.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

### **III. Application for Expedited Processing**

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<sup>19</sup> For the purposes of this Request, "records" are collectively defined to include, but are not limited to, final drafts of legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; and memoranda of understanding.

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>20</sup> 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).

A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>21</sup> 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. DOJ*, 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”).<sup>22</sup>

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The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>23</sup>

<sup>20</sup> *See also* 28 C.F.R. § 16.5(e); 32 C.F.R. § 286.8(e); 6 C.F.R. § 5.5(e).

<sup>21</sup> *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

<sup>22</sup> 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. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

<sup>23</sup> *See, e.g.,* Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-responso-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakcs (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>24</sup>

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.<sup>25</sup> The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and

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Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

<sup>24</sup> See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, The Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

<sup>25</sup> See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone 'Playbook' — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-exccutive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems* (Oct. 29, 2013), [https://www.aclu.org/sites/default/files/assets/eye\\_on\\_fbi\\_-\\_sars.pdf](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).



educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

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The ACLU website includes many features on information obtained through the FOIA.<sup>26</sup> For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition,

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<sup>26</sup> *See, e.g.,* Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/cases/bagram-foia>; *Bagram FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

detention, and interrogation.<sup>27</sup>

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.<sup>28</sup> Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program<sup>29</sup>; a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>30</sup>; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests<sup>31</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>32</sup>

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The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

*B. The records sought are urgently needed to inform the public about actual or alleged government activity.*

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<sup>27</sup> *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>28</sup> *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), [https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf).

<sup>29</sup> *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), [https://www.aclu.org/sites/default/files/field\\_document/dem17-tsa\\_detection\\_report-v02.pdf](https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf).

<sup>30</sup> *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

<sup>31</sup> *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

<sup>32</sup> Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

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).<sup>33</sup> Specifically, the requested records relate to forthcoming cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for protests against the Keystone XL pipeline. As discussed in Part I, *supra*, oil pipelines, protests against them, and law enforcements responses to these protests are the subject of widespread public controversy and media attention.<sup>34</sup> The records sought relate to a matter of widespread and exceptional media interest in planned oil pipelines, protests against them, and law enforcement responses to these protests.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

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#### **IV. Application for Waiver or Limitation of Fees**

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure 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)(iii).<sup>35</sup> The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

*A. The Request 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 ACLU.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about cooperation between federal, state, and local law enforcement entities and between federal entities and private security companies around anticipated pipeline protests is publicly available, the records sought are certain to contribute significantly to the public’s understanding of what type of efforts the federal government is undertaking in preparation for protests against the Keystone XL pipeline.

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<sup>33</sup> *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

<sup>34</sup> *See supra* notes 4–7 and accompanying text.

<sup>35</sup> *See also* 28 C.F.R. § 16.10(k)(2); 32 C.F.R. § 286.12(l)(1); 6 C.F.R. § 5.11(k)(1).

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

B. *The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).<sup>36</sup> The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III)<sup>37</sup>; *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information."

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's to be "representatives of the news media" as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10-15 (finding non-profit public interest group that

<sup>36</sup> *See also* 28 C.F.R. 16.10(k)(2)(ii)(B); 32 C.F.R. § 286.12 (l)(2)(ii)(b); 6 C.F.R. § 5.11(k)(2)(iii).

<sup>37</sup> *See also* 28 C.F.R. 16.10(b)(6); 32 C.F.R. § 286.12(b)(6); 6 C.F.R. § 5.11(b)(6).

disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding *Judicial Watch*, self-described as a “public interest law firm,” a news media requester).<sup>38</sup>

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”<sup>39</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

\* \* \*

Pursuant to 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); 28 C.F.R. 16.5(e)(4); 32 C.F.R. § 286.8(e)(1); 6 C.F.R. § 5.5(e)(4).

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If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. 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 or deny a waiver of fees.

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<sup>38</sup> Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

<sup>39</sup> In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

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

Jacob Hutt  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, New York 10004  
T: 212.519.7809  
jhutt@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

/s/ Jacob J. Hutt  
Jacob J. Hutt  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
T: 212.519.7809  
jhutt@aclu.org

Alex Rate  
Legal Director  
ACLU of Montana  
P.O. Box 9138  
Missoula, MT 59807  
T: 406.224.1447  
ratea@aclumontana.org

Courtney A. Bowie\*  
Legal Director  
ACLU of North Dakota  
P.O. Box 1190  
Fargo, ND 58107  
T: 201.284.9500  
cbowie@aclu.org  
\*Admitted in MS, AL, and  
MA (inactive)

Amy Miller  
Legal Director  
ACLU of Nebraska  
134 S. 13th St. #1010  
Lincoln, NE 68508  
T: 402.476.8091 ext. 106  
amiller@aclunbraska.org

Heather Smith  
Executive Director  
ACLU of South Dakota  
P.O. Box 1170  
Sioux Falls, SD 57101  
T: 605.362.2661  
heather.smith@aclu.org

**Smith, Mary A CIV USARMY CEHEC (US)**

---

**From:** Smith, Mary A CIV USARMY CEHEC (US)  
**Sent:** Tuesday, July 17, 2018 2:09 PM  
**To:** 'Jacob Hutt'  
**Subject:** Response to FOIA Request - Hutt - FP-18-009115  
**Attachments:** Hutt Letter.pdf; Hutt Documents.pdf

Dear Mr. Hutt,

Please see the attached in response to your FOIA request.

Best regards,

Mary Alice Smith  
Paralegal Specialist  
U.S. Army Corps of Engineers  
HECSA - Office of Counsel  
7701 Telegraph Road  
Alexandria, VA 22315  
703-428-8160 (office)  
703-428-7221 (fax)  
Mary.A.Smith@usace.army.mil

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DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY  
7701 TELEGRAPH ROAD  
ALEXANDRIA, VA 22315-3860

July 16, 2018

Office of Counsel

Mr. Jacob Hutt  
ACLU  
125 Broad Street, 18<sup>th</sup> Floor  
New York, New York 10004

Dear Mr. Hutt,

This is in response to your Freedom of Information Act (FOIA) request, dated January 23, 2018, for information records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline. By email dated February 12, 2018, Ms. Mary Alice Smith confirmed receipt of your FOIA request and assigned tracking number FP-18-009115.

I have coordinated with our Headquarters Operational Protection Division and received 12 pages of emails that were considered responsive to your request. One email consisting of five pages is being withheld in its entirety pursuant to Exemptions 5, 6, and 7(A) of the FOIA as discussed below. The remaining seven pages are provided in redacted form pursuant to Exemption 6 of the FOIA.

Exemption 5 of the FOIA addresses "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." See: 5 U.S.C. § 552(b)(5). The applicable privilege recognized by Exemption 5 is the Deliberative Process Privilege. The Deliberative Process Privilege protects "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149. The information that has been characterized as deliberative includes an email between HQUSACE and the Department of Justice. That email, and its attachment contains information, and discussions concerning potential protest activity and protestor targeting of USACE leadership. This material embodies the purpose for the Deliberative Process Privilege which exists to encourage open and frank discussions between government agencies and officials, to protect against premature disclosure of proposed policies before they're finally adopted, and to protect against public confusion that could result from disclosure of rationales that are not ultimately adopted as an agency decision. *Kidd v. U.S. Department of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents"). The potential disclosure of any and every comment in a policy discussion would surely chill the climate of open communication between government personnel.



Exemption 6 protects information that if released, would constitute a clearly unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). In applying Exemption 6, an individual privacy interest must be weighed against the public interest in that information. If the privacy interest outweighs the public interest, the information should be withheld. Since the terrorist attacks of September 11, 2001, there has been a heightened interest in protecting the security and privacy of DOD personnel. In the current world security climate, DOD personnel and their families are particularly vulnerable to harassment and attack from terrorists and others wishing to do them harm. See: Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001). In this instance, the information that has been redacted includes names and email addresses of certain Army Employees. I have determined that the privacy interests at stake are greater than the public's interest in the personal contact information of individuals involved in the requested correspondence.

Exemption 7 of the FOIA protects from disclosure "records or information compiled for law enforcement purposes..." 5 U.S.C. §552(b)(7)(2006). The applicable Exemption 7 subpart is 7(A) which protects information that, if released, could reasonably be expected to interfere with enforcement proceedings. As previously stated, the email withheld pursuant to Exemption 7(A) is an email between a Department of Justice Intelligence Specialist and the USACE Operational Protection Division concerning potential protest activity and protestor targeting of USACE leadership. Release of this type of material may impact federal agencies' ability to anticipate and respond to certain threats thereby interfering with prevention of the same and law enforcement proceedings in response thereto.

For any further assistance and to discuss any aspect of your request, you have the right to contact the USACE FOIA Public Liaison at foia-liaison@usace.army.mil or by calling (202) 761-4791. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-36001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Finally, if you are not satisfied with this response, you have the right to appeal my determination to the Secretary of the Army. Your appeal package should bear the notation "Freedom of Information Act Appeal" and should be emailed to [foia@usace.army.mil](mailto:foia@usace.army.mil) or sent to me at the address depicted on the letterhead above. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response.

Sincerely,



For Damon Roberts  
HECSA Counsel

**From:** [Thurn, Linda](#)  
**To:** [Gabriella Torres](#); [Jon Raby](#); [Jackson, Donald E Jr MG USARMY CEHO \(US\)](#); [O'Sullivan, Ian P MAJ USARMY CEHO \(US\)](#); [Michael Anderson](#); [Ryan Sklar](#); Sara A Sorensen; William Van Houten; William Van Houten; [Fletcher, Matthew M CPT USARMY CEHO \(US\)](#); [HassellMD@state.gov](#)  
**Subject:** [Non-DoD Source] Agenda for Keystone Meeting on May 18 at 4:00 pm (Eastern Time)  
**Date:** Monday, May 15, 2017 10:53:34 AM  
**Attachments:** [5.18.17 Meeting Agenda.docx](#)

---

Good morning,

Please see the attached agenda for the upcoming Keystone Meeting on Thursday.

Thank you,

Linda Thurn

Executive Assistant

Bureau of Land Management

202-208-3801

**From:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** RE: [Non-DoD Source] Keystone XL -- status update  
**Date:** Thursday, June 1, 2017 9:27:31 AM

---

[REDACTED]

I am the right guy for now - but definitely my office.

Thanks

[REDACTED]

v/r,

[REDACTED]

Chief, Operational Protection Division  
Directorate of Contingency Operations  
Headquarters, U.S. Army Corps of Engineers  
441. G. Street NW  
Washington, DC 20314-1000  
NIPR [REDACTED]  
SIPR: [REDACTED]  
Office: 202-761-5824  
DSN: 312-763-5824  
BB: [REDACTED]

-----Original Message-----

**From:** [REDACTED]  
**Sent:** Thursday, June 01, 2017 9:25 AM  
**To:** [REDACTED]  
**Subject:** FW: [Non-DoD Source] Keystone XL -- status update

[REDACTED]

See below. We agreed to start having some discussion on security for Keystone pipeline. When MG Jackson and I attended the last meeting, we thought you would be the right guy, but I will defer to you if you think otherwise.

Otherwise, I will send Ryan your contact info as they start planning this.

[REDACTED]

[REDACTED]

Deputy Chief, Northwestern and Pacific Ocean  
Divisions-Regional Integration Team  
Headquarters, US Army Corps of Engineers  
(202) 761-4527 (office)

[REDACTED]

-----Original Message-----

From: Sklar, Ryan [<mailto:ryan.sklar@sol.doi.gov>]

Sent: Thursday, June 01, 2017 8:21 AM

To [REDACTED]

Subject: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

It's been a couple of weeks since our meeting so I thought it would be helpful to check in on the status of USACE's Section 408 review. Is the technical review complete and has USACE identified any concerns in addition to those we have previously discussed (i.e., those related to the scour analysis, horizontal drilling directional plan, and cultural resource information provided by TransCanada)? In addition, is USACE still waiting on any follow-up information from TransCanada? As of the May 18 meeting, TransCanada had provided most, but not all, of the requested information. I wanted to see if those gaps have been filled.

Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

--

Ryan Sklar  
Acting Senior Litigation Specialist  
Bureau of Land Management  
U.S. Department of the Interior  
202-208-4695

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**USA\_ACE\_000020**

**From:** [Sklar, Ryan](#)  
**To:** [REDACTED]  
**Subject:** Re: [Non-DoD Source] Keystone XL -- status update  
**Date:** Thursday, June 8, 2017 12:01:56 PM

---

[REDACTED]

Thanks for the quick reply. We do not yet have a formal charter or business rules for the interagency team. The team is still in the formative stages, but we expect that there will be an incident command structure and that the state of Montana will take the lead. We will have more details once we get the names of the appropriate participants and get a little farther in the planning process.

Just to confirm, will you be sending me the names of the potentially affected Division and District security managers in the near future or should you be the only USACE point of contact for now?

Thanks,  
Ryan

On Thu, Jun 8, 2017 at 9:26 AM, [REDACTED] CIV USARMY CEHQ (US) > wrote:

Ryan,

For now let's use me as the Primary POC. My Law Enforcement Chief doesn't come on board until 1 July and we can make a potential transition from there. For now based on my experience with DAPL I prefer to stay the lead.

When it comes to any Field Offices I will gather the names of the potentially affected Division and District security managers.

Can you give me an idea of the Charter or Business Rules that will be for this interagency team? How often they will meet, where, etc.?

Thanks  
[REDACTED]

v/r,  
[REDACTED]

Chief, Operational Protection Division  
Directorate of Contingency Operations  
Headquarters, U.S. Army Corps of Engineers  
441. G. Street NW  
Washington, DC 20314-1000

NIPR: [REDACTED]

SIPR: [REDACTED]

Office: 202-761-5824

DSN: 312-763-5824

BB: [REDACTED]

-----Original Message-----

From: Sklar, Ryan [<mailto:ryan.sklar@sol.doi.gov> <<mailto:ryan.sklar@sol.doi.gov>> ]

Sent: Thursday, June 08, 2017 8:53 AM

**USA\_ACE\_000021**

[REDACTED]

Subject: Fwd: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

I wanted to follow up on my email, originally communicated to [REDACTED] asking who from USACE should participate in the interagency team we're putting together to deal with safety and security concerns related to the Keystone XL project. Can you please let me know who from HQUSACE and the relevant USACE field offices should participate? The team will also be comprised of members of the Bureau of Land Management, the State Department, and state and local law enforcement agencies.

Thank you,  
Ryan

----- Forwarded message -----

[REDACTED]

Date: Thu, Jun 1, 2017 at 9:33 AM  
Subject: RE: [Non-DoD Source] Keystone XL -- status update  
To: "Sklar, Ryan" <ryan.sklar@sol.doi.gov <<mailto:ryan.sklar@sol.doi.gov>> >

[REDACTED]

<Blockedhttp://army.mil <Blockedhttp://army.mil> > >

Ryan,

At the moment, I do not know of any new issues other than those three we discussed, and as our initial review has completed, I don't expect any additional ones. Let me touch base with our field folks on the new information. Also, our folks are looking at the PCN submissions for the Section 404 permit, and we are on track to get an initial read within 30 days.

For Security [REDACTED] is our security lead for HQUSACE, and also works with our security folks in the field as well. His contact info is: (202) 761-5824, and [REDACTED]

[REDACTED]

[I am looping him into this conversation, as he may want to send a few of his folks.](#)

[REDACTED]

[Deputy Chief, Northwestern and Pacific Ocean](#)  
[Divisions-Regional Integration Team](#)  
[Headquarters, US Army Corps of Engineers](#)  
[\(202\) 761-4527 \(office\)](#)

[REDACTED]

-----Original Message-----

From: Sklar, Ryan [<mailto:ryan.sklar@sol.doi.gov> <<mailto:ryan.sklar@sol.doi.gov>> <<mailto:ryan.sklar@sol.doi.gov>> >]

Sent: Thursday, June 01, 2017 8:21 AM

To: [REDACTED]  
<mailto: [REDACTED]  
Subject: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

It's been a couple of weeks since our meeting so I thought it would be helpful to check in on the status of USACE's Section 408 review. Is the technical review complete and has USACE identified any concerns in addition to those we have previously discussed (i.e., those related to the scour analysis, horizontal drilling directional plan, and cultural resource information provided by TransCanada)? In addition, is USACE still waiting on any follow-up information from TransCanada? As of the May 18 meeting, TransCanada had provided most, but not all, of the requested information. I wanted to see if those gaps have been filled.

Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

Ryan Sklar  
Acting Senior Litigation Specialist  
Bureau of Land Management  
U.S. Department of the Interior  
202-208-4695

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\_\_\_\_\_  
Ryan Sklar  
Attorney-Advisor  
Office of the Solicitor  
U.S. Department of the Interior  
202-208-3039

\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
  
\_\_\_\_\_  
Ryan Sklar  
Attorney-Advisor  
Office of the Solicitor  
U.S. Department of the Interior  
202-208-3039

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August 3, 2018

Department of the Army  
U.S. Army Corp of Engineers  
Humphreys Engineer Center Support Activity  
7701 Telegraph Road  
Alexandria, VA 22315-3860

Re: **FOIA Appeal**  
**USACE FOIA FP-18-009115**

To Whom It May Concern:

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, “ACLU”) write to appeal the U.S. Army Corps of Engineers’ (“USACE”) determination regarding records responsive to the ACLU’s Freedom of Information Act (“FOIA”) request (“Request”) concerning cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparation for anticipated protests against the Keystone XL pipeline. *See* Ex. A (FOIA Request dated January 23, 2018). Humphreys Engineer Center Support Activity (HECSA) Counsel Damon Roberts’ response letter (“Final Response”) is dated July 16, 2018. *See* Ex. B (Response Letter, USACE FOIA FP-18-009115). In response to the Request, USACE withheld in its entirety “one email consisting of five pages,” and provided seven redacted pages of emails discussing interagency cooperation for security around Keystone XL. Ex. C (Redacted USACE Emails, May–June 2017). The ACLU respectfully appeals from USACE’s determination on the following bases: 1) the agency did not conduct an adequate search for records; and 2) the agency improperly withheld documents; 3) the agency improperly redacted the documents provided in response to the Request.

*1. Inadequate search*

“An inadequate search for records constitutes an improper withholding under the FOIA.” *Dean v. U.S. Dep’t of Justice*, 141 F. Supp. 3d 46, 48 (D.D.C. 2015). “An agency’s search is adequate if its methods are reasonably calculated to locate records responsive to a FOIA request.” *Hodge v. FBI*, 764 F. Supp. 2d 134, 141 (D.D.C. 2011); *see also* 32 C.F.R. § 286.5(a) (explaining that FOIA requires agencies to “locate [records requested] with a reasonable amount of effort.”).

By failing to disclose responsive records within the applicable timeframe and failing to provide a plausible justification for nondisclosure, the USACE has violated 5 U.S.C. § 552(a)(6)(A). To the extent that this failure is

attributable to the adequacy of the USACE's search for responsive records, the USACE violated 5 U.S.C. § 552(a)(3)(C), (D).

First, it is not plausible that a comprehensive search by USACE would reveal a mere 12 pages of emails on a subject which, according to the agency's own communications, is now the basis for an "interagency team" on Keystone XL security. Ex. C at 4. Emails disclosed to the ACLU by USACE include several conversations in which USACE officials describe forming a team with "members of the Bureau of Land Management, the State Department, and state and local law enforcement agencies" to address security concerns around Keystone XL. *Id.* at 5. It is implausible that the entire communications history of such a broad, multi-actor team constitutes a dozen emails, and nothing more. The timestamp of these emails heightens this implausibility: they occur in May and June of 2017, over a year ago. It is difficult to believe that this interagency team has produced 12 emails in over a year of existence.

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Second, agency communications on preparation for oil pipeline protests comprised just one of four categories of information the ACLU requested in the original Request. The ACLU also requested 1) legal and policy analyses and recommendations, 2) records of travel of federal employees to speaking engagements, private and public meetings, panels, and conferences, and 3) meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss oil pipeline protests. Ex. A at 6. USACE's failure to provide records in these categories is not credible given that the agency made explicit reference to such records' existence. In an email sent to USACE officials on May 15, 2017, a Bureau of Land Management executive assistant writes, "Please see the attached agenda for the upcoming Keystone Meeting on Thursday." Ex. C at 1. The referenced "agenda" does not appear in USACE's July 16 disclosure to the ACLU, but according to this email, it exists. In over a year of coordination with federal, state, and local law enforcement agencies, it is implausible that USACE does not possess records (besides emails) showing security preparations for Keystone XL.

Finally, USACE's Final Response lacks any explanation concerning why the agency's efforts turned up so few records. USACE specified neither the databases or email accounts that were searched, nor the search terms or methods used to seek responsive records. Because an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested," *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), the agency "at a minimum ha[s] to aver that it has searched all files likely to contain relevant documents." *Am. Immigr. Council v. DHS*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013).

For these reasons, USACE has failed to conduct a search “reasonably calculated to locate” responsive records. *Hodge*, 764 F. Supp. 2d at 141.

2. *Improper withholding and redaction*

In order to properly invoke a FOIA exemption, an agency must provide “detailed” and “specific” justifications for why the claimed exemption applies. *See generally Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (“[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions.”). This requirement applies just as forcefully to an agency’s final response letter as it does to its briefing in federal court. *See Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (“[T]he objective of the Vaughn requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within the agency.”).

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USACE’s Final Response fails this requirement, due to improper invocation of FOIA exemptions to withhold and redact documents responsive to the ACLU’s Request, as follows.

A. Improper withholding

The Final Response states that one email consisting of five pages has been withheld in its entirety pursuant to Exemptions 5, 6, and 7(A). Specifically, the agency claims that the Deliberative Process Privilege of Exemption 5 and the law enforcement proceedings clause of Exemption 7 (subpart (A)) exempt this email from disclosure. USACE has failed to explain how either of these exemptions justify withholding the responsive document in its entirety.<sup>1</sup>

The Deliberative Process Privilege, which protects “predecisional” and “deliberative” documents, is “so dependent upon the individual document and the role it plays in the administrative process,” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), that courts have required the government to describe withheld documents in detail to justify claims of privilege. Such descriptions may include how the document was ultimately used, with whom it was shared, whether it was directed at a particular case, and whether portions of it are factual (and therefore disclosable).

In this case, the Final Response letter lacks the factual content and specificity required to establish the Deliberative Process Privilege. After disclosing the email’s basic subject and the agencies involved in the email discussion, USACE simply restates the purposes underlying the Privilege,

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<sup>1</sup> The ACLU does not object to the redaction of employee names on this document, but does object to the redaction of information showing institutional affiliation, as explained *infra*.

noting that this material “embodies” these purposes. Ex. B at 1. Without more specificity, it is impossible to determine whether the document falls within the scope of the Privilege. As with all withholdings under FOIA, the government bears the burden of establishing the Privilege applies, *see In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007), and the government has failed to bear its burden here.

The Final Response’s attempt to invoke Exemption 7(A) is similarly unavailing. To justify withholding, the USACE must demonstrate that the disclosure could reasonably be expected to interfere with proceedings that are “pending or reasonably anticipated.” *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). USACE has simply concluded, without explanation, that release of this material could impact federal agencies’ ability to anticipate threats, and that this impact would interfere with proceedings in response to said threats. This vague assertion does nothing to explain how future law enforcement proceedings related to the withheld material are “reasonably anticipated.”

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Finally, even if some of USACE’s exemptions are appropriate, the agency has still failed to justify an entire withholding rather than releasing reasonably segregable material. 5 U.S.C. § 552(b). “The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Mead Data Central*, 566 F.2d at 260. USACE does not explain why it has failed to segregate the non-exempt materials from the email that has been withheld; in fact, the agency does not even attempt to claim that the information is not reasonably segregable.

USACE’s invocations of Exemptions 5 and 7(A) do not adequately justify the withholding in full of an email on potential protest activity.

B. Improper redaction

The Final Response states that the disclosed emails have redacted “names and email addresses of certain Army Employees” pursuant to Exemption 6. Ex. B. at 2. The ACLU does not object to the redaction of names of these employees. However, the redactions are overbroad, as they appear to obscure not only the names of the employees but their institutional affiliations as well. A more finely tuned redaction could obscure the name of the employee, but leave legible the suffix of this employee’s email address (for example, “[REDACTED]@usace.army.mil”). Agency names, unlike individual employee names, may not be withheld under Exemption 6.

\* \* \*

USACE's decision to deny the ACLU records pertaining to law enforcement preparation for oil pipeline protests was in error. Accordingly, we respectfully request that you order a new search using methods "reasonably calculated to uncover all relevant documents." The Final Response also violates FOIA by failing to justify the withholdings and redactions under Exemptions 5, 6, and 7(A). Accordingly, we ask that the documents in question be released, in part or in full, and that the ACLU be provided with an adequate justification for any redactions. My phone and email contact information is below.

Thank you for your consideration of this appeal, and we look forward to your prompt response.

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Respectfully Submitted,

/s/ Jacob J. Hutt

Jacob J. Hutt  
Speech, Privacy, and Technology Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 519-7809  
jhutt@aclu.org

**EXHIBIT A**

LEGAL DEPARTMENT



January 23, 2018

Federal Bureau of Investigation  
Attn: FOI/PA Request  
Record/Information Dissemination Section  
170 Marcel Drive  
Winchester, VA 22602-4843  
Fax: (540) 868-4391/4997  
Email: foiparequest@ic.fbi.gov

Melissa Golden (née Kassier)  
Lead Paralegal and FOIA Specialist  
Office of Legal Counsel  
Room 5511, 950 Pennsylvania Avenue, N.W.  
Department of Justice  
Washington, DC 20530-0001  
Fax: (202) 514-2053  
Email: usdoj-officeoflegalcounsel@usdoj.gov

**AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION**  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

**OFFICERS AND DIRECTORS**  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT B. REMAR  
TREASURER

OSD/JS FOIA Requester Service Center  
Office of Freedom of Information  
1155 Defense Pentagon  
Washington, DC 20301-1155  
Fax: (571) 372-0500

Nicole Barksdale-Perry (Acting)  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655  
Fax: (202) 343-4011  
Email: foia@hq.dhs.gov

U.S. Army Humphreys Engineer Support Center  
Attention: CEHEC-OC  
7701 Telegraph Road  
Alexandria, Virginia 22315-3860  
Fax: (703) 428-7633

National FOIA Office  
Bureau of Land Management  
Attn: FOIA Office (WO-640)

**USA\_ACE\_000031**

1849 C St. N.W.  
Washington, DC 20240  
Fax: (202) 245-0050  
Email: blm\_wo\_foia@blm.gov

**Re: Request Under Freedom of Information Act  
(Expedited Processing & Fee Waiver Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)<sup>1</sup> submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline.

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**I. Background**

On January 27, 2017, the White House released its Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, which expedited the approval process for the Canada-to-Texas oil pipeline that President Barack Obama had previously rejected.<sup>2</sup> Two months later, President Donald Trump announced that his administration had formally approved the pipeline.<sup>3</sup>

These decisions generated intense public controversy and debate. The president’s approval of the Keystone XL Pipeline set the stage for renewed protest against oil pipelines, which activist groups say accelerate climate change,

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<sup>1</sup> The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> See Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/>; Elise Labott & Dan Berman, *Obama Rejects Keystone XL Pipeline*, CNN (Nov. 6, 2015), <http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/index.html>.

<sup>3</sup> Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN (Mar. 24, 2017), <http://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html>.



threaten clean water reserves, and invade cultural sites of American Indian tribes.<sup>4</sup> In response to the president's announcement, then-chairman of the Standing Rock Sioux tribe, David Archambault II, stated, "We opposed Keystone before, and we'll oppose it again."<sup>5</sup> Environmental groups, too, have made clear their intention to protest Keystone XL's construction; one prominent group has invited advocates to sign a "Pledge of Resistance," which includes a commitment to "participate in peaceful direct action that may result in my arrest, should construction begin on the Keystone XL pipeline."<sup>6</sup>

Government officials have consequently made clear their intention to prevent a repeat of the prolonged protests against the Dakota Access Pipeline, which drew thousands of activists to the North Dakota site, sparked physical confrontation with law enforcement authorities, and captured worldwide attention.<sup>7</sup> Officials have pursued numerous strategies for impeding these protests, such as asking the federal government for guidance on the possibility of prosecuting protestors under domestic terrorism laws,<sup>8</sup> enacting legislation that allows a governor or sheriff to prohibit groups numbering more than 20 from gathering on public land,<sup>9</sup> and fostering cooperation between federal, state, and local law enforcement entities and private security contractors.<sup>10</sup> As a

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<sup>4</sup> Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, National Geographic (Jan. 25, 2017), <https://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/>.

<sup>5</sup> Stand with Standing Rock, *Standing Rock Sioux Chairman Responds to Keystone Pipeline Permit Approval* (Mar. 24, 2017), <http://standwithstandingrock.net/standing-rock-sioux-chairman-responds-keystone-pipeline-permit-approval/>.

<sup>6</sup> Bold Alliance, *Sign the Keystone XL Pledge of Resistance* (last visited Dec. 27, 2017), [https://boldalliance.webaction.org/p/dia/action3/common/public/?action\\_KEY=20257](https://boldalliance.webaction.org/p/dia/action3/common/public/?action_KEY=20257); see also Michael McLaughlin, *Keystone XL Protesters Won't Back Down After Trump Approval*, Huffington Post (Mar. 24, 2017), [https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval\\_us\\_58d55333e4b02a2eaab3819e](https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval_us_58d55333e4b02a2eaab3819e).

<sup>7</sup> See, e.g., Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World-Herald (Apr. 11, 2017), [http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article\\_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html](http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html).

<sup>8</sup> Timothy Gardner, *U.S. Lawmakers Ask DOJ If Terrorism Law Covers Pipeline Activists*, Reuters (Oct. 23, 2017), <https://www.reuters.com/article/us-usa-pipelines-activism/u-s-lawmakers-ask-doj-if-terrorism-law-covers-pipeline-activists-idUSKBN1CS2XY>.

<sup>9</sup> South Dakota Senate Bill 176 (Mar. 27, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/03/SB-176.pdf>.

<sup>10</sup> Alleen Brown, *Nebraska Approves Keystone XL Pipeline as Opponents Face Criminalization of Protests*, The Intercept (Nov. 20, 2017), <https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/>; *Lincoln Police Prepare for All Scenarios as Pipeline Protests Near*,

further threat to activists who may wish to repeat their actions at the Dakota Access Pipeline, the *Guardian* reports that Joint Terrorism Task Force agents have attempted to contact multiple individuals involved with the North Dakota anti-pipeline movement.<sup>11</sup>

Evidence of cooperation among law enforcement officials and private corporations in the area of oil pipeline protests has been widely documented. On May 27, 2017, *The Intercept* published internal documents of the security firm TigerSwan that revealed close cooperation between TigerSwan, state police forces, and federal law enforcement in at least five states around the Dakota Access Pipeline.<sup>12</sup> For example, a TigerSwan situation report on March 29, 2016 explicitly named the state and federal actors in attendance at a joint meeting the day before: “Met with the Des Moines Field Office of the FBI, with the Omaha and Sioux Fall offices joining by conference call. Also in attendance were representatives of the Joint Terrorism Task Force, Department of Homeland Security . . . Topics covered included the current threat assessment of the pipeline, the layout of current security assets and persons of interests. The FBI seemed were [sic] very receptive . . . follow-up meetings with individuals will be scheduled soon[.]”<sup>13</sup> *The Intercept* also published communications detailing coordination “between a wide range of local, state, and federal agencies,” including the revelation that the FBI participated in law enforcement operations related to the Dakota Access Pipeline protests.<sup>14</sup> Finally, a review of federal lobbying disclosure forms by *DeSmog*, a blog focused on topics related to climate change, has revealed that the National Sheriffs’ Association was

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1011 Now (Aug. 1, 2017), <http://www.1011now.com/content/news/Lincoln-Police-prepare-for-all-scenarios-as-pipeline-protests--437938853.html>.

<sup>11</sup> Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, *The Guardian* (Feb. 10, 2017), <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access>.

<sup>12</sup> Alleen Brown, Will Parrish, and Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies”*, *The Intercept* (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

<sup>13</sup> Alleen Brown, Will Parrish, and Alice Speri, *TigerSwan Responded to Pipeline Vandalism by Launching Multistate Dagnet*, *The Intercept* (Aug. 26, 2017), <https://theintercept.com/2017/08/26/dapl-security-firm-tigerswan-responded-to-pipeline-vandalism-by-launching-multistate-dagnet/>.

<sup>14</sup> Brown, Parrish & Speri, *Leaked Documents Reveal Counterterrorism Tactics; see also Intel Group Email Thread*, *The Intercept* (May 27, 2017), <https://theintercept.com/document/2017/05/27/intel-group-email-thread/> (documenting FBI participation in law enforcement operations around the Dakota Access Pipeline protests).

lobbying Congress for surplus military gear and on issues related to the Dakota Access Pipeline.<sup>15</sup>

Law enforcement officials have signaled that such cooperation will assist them in responding to future protests against Keystone XL and other oil pipelines. For example, on April 11, 2017, the *Omaha Herald* reported that Morton County, North Dakota Sheriff Kyle Kirchmeier, whose department was involved in responding to the Dakota Access Pipeline protests, has been in communication with other states over how to respond to oil pipeline protestors.<sup>16</sup>

Such indications and the recent existence of cooperation on this exact issue raise important questions about federal agencies' level of collaboration with state and local governments and with private security contractors in connection with oil pipeline protest actions. These questions are especially important given the uncertainty around whether and to what extent the government was engaged in surveillance of Dakota Access Pipeline protestors.<sup>17</sup> The First Amendment protects political speech from the threat of undue government scrutiny, and the extent of such scrutiny is currently unknown.<sup>18</sup>

To provide the American public with information about federal cooperation with state and local governments and with private security contractors over possible oil pipeline protests, the ACLU seeks such information through this FOIA request.

## **II. Requested Records**

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<sup>15</sup> Steven Horn & Curtis Waltman, *In Heat of Dakota Access Protests, National Sheriffs' Association Lobbied for More Military Gear*, DeSmog (Apr. 27, 2017), <https://www.desmogblog.com/2017/04/27/dakota-access-sheriffs-lobbying-military-gear>.

<sup>16</sup> Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World Herald (Apr. 11, 2017), [http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article\\_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html](http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html).

<sup>17</sup> Alyssa Newcomb, Daniel A. Medina, Emmanuelle Saliba, and Chiara A. Sottile, *At Dakota Pipeline, Protestors Questions of Surveillance and 'Jamming' Linger*, NBC (Oct. 31, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-questions-surveillance-jamming-linger-n675866>; Morgan Chalfant, *ACLU Challenges Warrant to Search Facebook Page of Dakota Access Opponents*, The Hill (Mar. 9, 2017), <http://thehill.com/policy/cybersecurity/323131-aclu-challenges-police-effort-to-search-facebook-page-of-dakota-access>.

<sup>18</sup> See Motion to Quash Search Warrant, American Civil Liberties Union, *In Re Search Warrant No. 17A03639 Served On Facebook* at 5 (filed Mar. 8, 2017), [https://www.aclu.org/sites/default/files/field\\_document/motion\\_to\\_quash\\_-\\_filed.pdf](https://www.aclu.org/sites/default/files/field_document/motion_to_quash_-_filed.pdf).

With respect to **all agencies** listed above, the ACLU seeks the release of all records<sup>19</sup> created since January 27, 2017, concerning:

(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and

(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

With respect to the **Office of the Secretary of Defense**, the ACLU seeks the release of all records created since January 27, 2017, concerning:

(5) Purchases, requests for purchase, and requests by state and local law enforcement officials of riot gear, including but not limited to tear gas, concussion grenades, and water cannons, from the U.S. Department of Defense's Law Enforcement Support Office, also known as the 1033 program.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

### **III. Application for Expedited Processing**

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<sup>19</sup> For the purposes of this Request, "records" are collectively defined to include, but are not limited to, final drafts of legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; and memoranda of understanding.

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>20</sup> 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).

A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>21</sup> 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. DOJ*, 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”).<sup>22</sup>

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>23</sup>

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<sup>20</sup> *See also* 28 C.F.R. § 16.5(e); 32 C.F.R. § 286.8(e); 6 C.F.R. § 5.5(e).

<sup>21</sup> *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

<sup>22</sup> 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. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

<sup>23</sup> *See, e.g.,* Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>24</sup>

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.<sup>25</sup> The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and

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Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

<sup>24</sup> See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, *The Intercept*, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, *Wash. Post*, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, *ABC*, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, *Guardian*, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, *NPR*, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

<sup>25</sup> See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone 'Playbook' — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems* (Oct. 29, 2013), [https://www.aclu.org/sites/default/files/assets/eye\\_on\\_fbi\\_-\\_sars.pdf](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).

educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

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The ACLU website includes many features on information obtained through the FOIA.<sup>26</sup> For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition,

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<sup>26</sup> *See, e.g.*, Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpredirect/32088>.

detention, and interrogation.<sup>27</sup>

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.<sup>28</sup> Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program<sup>29</sup>; a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>30</sup>; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests<sup>31</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>32</sup>

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The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

*B. The records sought are urgently needed to inform the public about actual or alleged government activity.*

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<sup>27</sup> *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>28</sup> *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), [https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf).

<sup>29</sup> *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), [https://www.aclu.org/sites/default/files/field\\_document/dem17-tsa\\_detection\\_report-v02.pdf](https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf).

<sup>30</sup> *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natscc/faafoia20101129/20101129Summary.pdf>.

<sup>31</sup> *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

<sup>32</sup> Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.



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).<sup>33</sup> Specifically, the requested records relate to forthcoming cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for protests against the Keystone XL pipeline. As discussed in Part I, *supra*, oil pipelines, protests against them, and law enforcements responses to these protests are the subject of widespread public controversy and media attention.<sup>34</sup> The records sought relate to a matter of widespread and exceptional media interest in planned oil pipelines, protests against them, and law enforcement responses to these protests.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

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#### **IV. Application for Waiver or Limitation of Fees**

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure 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)(iii).<sup>35</sup> The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

*A. The Request 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 ACLU.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about cooperation between federal, state, and local law enforcement entities and between federal entities and private security companies around anticipated pipeline protests is publicly available, the records sought are certain to contribute significantly to the public’s understanding of what type of efforts the federal government is undertaking in preparation for protests against the Keystone XL pipeline.

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<sup>33</sup> *See also* 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

<sup>34</sup> *See supra* notes 4–7 and accompanying text.

<sup>35</sup> *See also* 28 C.F.R. § 16.10(k)(2); 32 C.F.R. § 286.12(l)(1); 6 C.F.R. § 5.11(k)(1).

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

*B. The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).<sup>36</sup> The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III)<sup>37</sup>; *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information."

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's to be "representatives of the news media" as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10-15 (finding non-profit public interest group that

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<sup>36</sup> *See also* 28 C.F.R. 16.10(k)(2)(ii)(B); 32 C.F.R. § 286.12 (l)(2)(ii)(b); 6 C.F.R. § 5.11(k)(2)(iii).

<sup>37</sup> *See also* 28 C.F.R. 16.10(b)(6); 32 C.F.R. § 286.12(b)(6); 6 C.F.R. § 5.11(b)(6).

disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).<sup>38</sup>

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”<sup>39</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

\* \* \*

Pursuant to 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); 28 C.F.R. 16.5(e)(4); 32 C.F.R. § 286.8(e)(1); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. 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 or deny a waiver of fees.

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<sup>38</sup> Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

<sup>39</sup> In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

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

Jacob Hutt  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, New York 10004  
T: 212.519.7809  
jhutt@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

/s/ Jacob J. Hutt

Jacob J. Hutt  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
T: 212.519.7809  
jhutt@aclu.org

Alex Rate  
Legal Director  
ACLU of Montana  
P.O. Box 9138  
Missoula, MT 59807  
T: 406.224.1447  
ratea@aclumontana.org

Courtney A. Bowie\*  
Legal Director  
ACLU of North Dakota  
P.O. Box 1190  
Fargo, ND 58107  
T: 201.284.9500  
cbowie@aclu.org  
\*Admitted in MS, AL, and  
MA (inactive)

Amy Miller  
Legal Director  
ACLU of Nebraska  
134 S. 13th St. #1010  
Lincoln, NE 68508  
T: 402.476.8091 ext. 106  
amiller@aclunbraska.org

Heather Smith  
Executive Director  
ACLU of South Dakota  
P.O. Box 1170  
Sioux Falls, SD 57101  
T: 605.362.2661  
heather.smith@aclu.org

**EXHIBIT B**



**DEPARTMENT OF THE ARMY**  
U.S. ARMY CORPS OF ENGINEERS  
HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY  
7701 TELEGRAPH ROAD  
ALEXANDRIA, VA 22315-3860

July 16, 2018

Office of Counsel

Mr. Jacob Hutt  
ACLU  
125 Broad Street, 18<sup>th</sup> Floor  
New York, New York 10004

Dear Mr. Hutt,

This is in response to your Freedom of Information Act (FOIA) request, dated January 23, 2018, for information records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline. By email dated February 12, 2018, Ms. Mary Alice Smith confirmed receipt of your FOIA request and assigned tracking number FP-18-009115.

I have coordinated with our Headquarters Operational Protection Division and received 12 pages of emails that were considered responsive to your request. One email consisting of five pages is being withheld in its entirety pursuant to Exemptions 5, 6, and 7(A) of the FOIA as discussed below. The remaining seven pages are provided in redacted form pursuant to Exemption 6 of the FOIA.

Exemption 5 of the FOIA addresses “inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency.” See: 5 U.S.C. § 552(b)(5). The applicable privilege recognized by Exemption 5 is the Deliberative Process Privilege. The Deliberative Process Privilege protects “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149. The information that has been characterized as deliberative includes an email between IIQUSACE and the Department of Justice. That email, and its attachment contains information, and discussions concerning potential protest activity and protestor targeting of USACE leadership. This material embodies the purpose for the Deliberative Process Privilege which exists to encourage open and frank discussions between government agencies and officials, to protect against premature disclosure of proposed policies before they’re finally adopted, and to protect against public confusion that could result from disclosure of rationales that are not ultimately adopted as an agency decision. *Kidd v. U.S. Department of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would “inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents”). The potential disclosure of any and every comment in a policy discussion would surely chill the climate of open communication between government personnel.

Exemption 6 protects information that if released, would constitute a clearly unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). In applying Exemption 6, an individual privacy interest must be weighed against the public interest in that information. If the privacy interest outweighs the public interest, the information should be withheld. Since the terrorist attacks of September 11, 2001, there has been a heightened interest in protecting the security and privacy of DOD personnel. In the current world security climate, DOD personnel and their families are particularly vulnerable to harassment and attack from terrorists and others wishing to do them harm. See: Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001). In this instance, the information that has been redacted includes names and email addresses of certain Army Employees. I have determined that the privacy interests at stake are greater than the public's interest in the personal contact information of individuals involved in the requested correspondence.

Exemption 7 of the FOIA protects from disclosure "records or information compiled for law enforcement purposes..." 5 U.S.C. §552(b)(7)(2006). The applicable Exemption 7 subpart is 7(A) which protects information that, if released, could reasonably be expected to interfere with enforcement proceedings. As previously stated, the email withheld pursuant to Exemption 7(A) is an email between a Department of Justice Intelligence Specialist and the USACE Operational Protection Division concerning potential protest activity and protestor targeting of USACE leadership. Release of this type of material may impact federal agencies' ability to anticipate and respond to certain threats thereby interfering with prevention of the same and law enforcement proceedings in response thereto.

For any further assistance and to discuss any aspect of your request, you have the right to contact the USACE FOIA Public Liaison at foia-liaison@usace.army.mil or by calling (202) 761-4791. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-36001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Finally, if you are not satisfied with this response, you have the right to appeal my determination to the Secretary of the Army. Your appeal package should bear the notation "Freedom of Information Act Appeal" and should be emailed to [foia@usace.army.mil](mailto:foia@usace.army.mil) or sent to me at the address depicted on the letterhead above. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this response.

Sincerely,



*FR* Damon Roberts  
HECSA Counsel

**EXHIBIT C**



**From:** [Thurn, Linda](#)  
**To:** [Gabriella Torres](#); [Jon Raby](#); [Jackson, Donald E Jr MG USARMY CEHO \(US\)](#); [O'Sullivan, Ian P MAJ USARMY CEHO \(US\)](#); [Michael Anderson](#); [Ryan Sklar](#); Sara A Sorensen; William Van Houten; William Van Houten; [Fletcher, Matthew M CPT USARMY CEHO \(US\)](#); [HassellMD@state.gov](#)  
**Subject:** [Non-DoD Source] Agenda for Keystone Meeting on May 18 at 4:00 pm (Eastern Time)  
**Date:** Monday, May 15, 2017 10:53:34 AM  
**Attachments:** [5.18.17 Meeting Agenda.docx](#)

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Good morning,

Please see the attached agenda for the upcoming Keystone Meeting on Thursday.

Thank you,

Linda Thurn

Executive Assistant

Bureau of Land Management

202-208-3801

**From:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** RE: [Non-DoD Source] Keystone XL -- status update  
**Date:** Thursday, June 1, 2017 9:27:31 AM

---

[REDACTED]

I am the right guy for now - but definitely my office.

Thanks

[REDACTED]

v/r,

[REDACTED]  
Chief, Operational Protection Division  
Directorate of Contingency Operations  
Headquarters, U.S. Army Corps of Engineers  
441. G. Street NW  
Washington, DC 20314-1000  
NIPR: [REDACTED]  
SIPR: [REDACTED]  
Office: 202-761-5824  
DSN: 312-763-5824  
BB: [REDACTED]

-----Original Message-----

**From:** [REDACTED]  
**Sent:** Thursday, June 01, 2017 9:25 AM  
**To:** [REDACTED]  
**Subject:** FW: [Non-DoD Source] Keystone XL -- status update

[REDACTED]

See below. We agreed to start having some discussion on security for Keystone pipeline. When MG Jackson and I attended the last meeting, we thought you would be the right guy, but I will defer to you if you think otherwise.

Otherwise, I will send Ryan your contact info as they start planning this.

[REDACTED]

[REDACTED]  
Deputy Chief, Northwestern and Pacific Ocean  
Divisions-Regional Integration Team  
Headquarters, US Army Corps of Engineers  
(202) 761-4527 (office)

[REDACTED]

-----Original Message-----

From: Sklar, Ryan [<mailto:ryan.sklar@sol.doi.gov>]

Sent: Thursday, June 01, 2017 8:21 AM

To [REDACTED]

Subject: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

It's been a couple of weeks since our meeting so I thought it would be helpful to check in on the status of USACE's Section 408 review. Is the technical review complete and has USACE identified any concerns in addition to those we have previously discussed (i.e., those related to the scour analysis, horizontal drilling directional plan, and cultural resource information provided by TransCanada)? In addition, is USACE still waiting on any follow-up information from TransCanada? As of the May 18 meeting, TransCanada had provided most, but not all, of the requested information. I wanted to see if those gaps have been filled.

Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

--

Ryan Sklar  
Acting Senior Litigation Specialist  
Bureau of Land Management  
U.S. Department of the Interior  
202-208-4695

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**From:** [Sklar, Ryan](#)  
**To:** [REDACTED]  
**Subject:** Re: [Non-DoD Source] Keystone XL -- status update  
**Date:** Thursday, June 8, 2017 12:01:56 PM

---

[REDACTED]

Thanks for the quick reply. We do not yet have a formal charter or business rules for the interagency team. The team is still in the formative stages, but we expect that there will be an incident command structure and that the state of Montana will take the lead. We will have more details once we get the names of the appropriate participants and get a little farther in the planning process.

Just to confirm, will you be sending me the names of the potentially affected Division and District security managers in the near future or should I be the only USACE point of contact for now?

Thanks,  
Ryan

On Thu, Jun 8, 2017 at 9:26 AM, [REDACTED] CIV USARMY CEHQ (US) > wrote:

Ryan,

For now let's use me as the Primary POC. My Law Enforcement Chief doesn't come on board until 1 July and we can make a potential transition from there. For now based on my experience with DAPL I prefer to stay the lead.

When it comes to any Field Offices I will gather the names of the potentially affected Division and District security managers.

Can you give me an idea of the Charter or Business Rules that will be for this interagency team? How often they will meet, where, etc.?

Thanks  
[REDACTED]

v/r,  
[REDACTED]

Chief, Operational Protection Division  
Directorate of Contingency Operations  
Headquarters, U.S. Army Corps of Engineers  
441. G. Street NW  
Washington, DC 20314-1000

NIPR: [REDACTED]

SIPR: [REDACTED]

Office: 202-761-5824

DSN: 312-763-5824

BB: [REDACTED]

-----Original Message-----

From: Sklar, Ryan [<mailto:ryan.sklar@sol.doi.gov> <<mailto:ryan.sklar@sol.doi.gov>> ]

Sent: Thursday, June 08, 2017 8:53 AM

Subject: Fwd: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

I wanted to follow up on my email, originally communicated to [REDACTED] asking who from USACE should participate in the interagency team we're putting together to deal with safety and security concerns related to the Keystone XL project. Can you please let me know who from HQUSACE and the relevant USACE field offices should participate? The team will also be comprised of members of the Bureau of Land Management, the State Department, and state and local law enforcement agencies.

Thank you,  
Ryan

----- Forwarded message -----

[REDACTED]  
Date: Thu, Jun 1, 2017 at 9:33 AM  
Subject: RE: [Non-DoD Source] Keystone XL -- status update  
To: "Sklar, Ryan" <ryan.sklar@sol.doi.gov <<mailto:ryan.sklar@sol.doi.gov>>> > [REDACTED]

<Blockedhttp://army.mil <Blockedhttp://army.mil> >>

Ryan,

At the moment, I do not know of any new issues other than those three we discussed, and as our initial review has completed, I don't expect any additional ones. Let me touch base with our field folks on the new information. Also, our folks are looking at the PCN submissions for the Section 404 permit, and we are on track to get an initial read within 30 days.

For Security [REDACTED] is our security lead for HQUSACE, and also works with our security folks in the field as well. His contact info is: (202) 761-5824, and [REDACTED]

[I am looping him into this conversation, as he may want to send a few of his folks.](#)

[REDACTED]  
[Deputy Chief, Northwestern and Pacific Ocean](#)  
[Divisions-Regional Integration Team](#)  
[Headquarters, US Army Corps of Engineers](#)  
[\(202\) 761-4527 \(office\)](#)

-----Original Message-----

[From: Sklar, Ryan \[mailto:ryan.sklar@sol.doi.gov <<mailto:ryan.sklar@sol.doi.gov>>>\]](#)

Sent: Thursday, June 01, 2017 8:21 AM

To: [REDACTED]  
<mailto:[REDACTED]>  
Subject: [Non-DoD Source] Keystone XL -- status update

Hi [REDACTED]

It's been a couple of weeks since our meeting so I thought it would be helpful to check in on the status of USACE's Section 408 review. Is the technical review complete and has USACE identified any concerns in addition to those we have previously discussed (i.e., those related to the scour analysis, horizontal drilling directional plan, and cultural resource information provided by TransCanada)? In addition, is USACE still waiting on any follow-up information from TransCanada? As of the May 18 meeting, TransCanada had provided most, but not all, of the requested information. I wanted to see if those gaps have been filled.

Finally, at the May 18 meeting, we discussed putting together an interagency team that would plan for safety and security concerns related to project approval and construction. Can you please provide names of the people from USACE who will be participating in that effort. We would like to stand up that team as soon as possible.

Thanks, and please let me know if there's any information you need from BLM.

Ryan

Ryan Sklar  
Acting Senior Litigation Specialist  
Bureau of Land Management  
U.S. Department of the Interior  
202-208-4695

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\_\_\_\_\_  
Ryan Sklar  
Attorney-Advisor  
Office of the Solicitor  
U.S. Department of the Interior  
202-208-3039

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Ryan Sklar  
Attorney-Advisor  
Office of the Solicitor  
U.S. Department of the Interior  
202-208-3039

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# Communication Plan Keystone XL Pipeline

## 1. PAO/PIO CONTACT LIST

<i>Organization</i>	<i>Name</i>	<i>Office Number</i>	<i>Cell Number</i>	<i>Email</i>
<b>U.S. Army Corps of Engineers</b>				
Omaha District	Capt. Ryan Hignight	402-995-2487	402-326-2782	ryan.hignight@usace.army.mil
<b>Department of State</b>				
Bureau of Energy Resources - Spokesperson	Alexandra Tenny	202-647-2521		tennyaz@state.gov
<b>Bureau of Land Management</b>				
Montana/Dakota Area Office	Al Nash	406-896-5260		al_nash@blm.gov
<b>State of South Dakota</b>				
Governor's Communications Director	Kelsey Pritchard	605-773-3212		kelsey.pritchard@state.sd.us
Governor's Chief of Staff	Tony Venhuizen			Tony.Venhuizen@state.sd.us
Governor's Director of Operations and Policy	Matt Konenkamp			Matt.Konenkamp@state.sd.us
Public Safety Communications Director/Director of Emergency Management	Kristi Turman			Kristi.Turman@state.sd.us
Public Safety PIO	Tony Mangan			Tony.Mangan@state.sd.us
<b>State of Montana</b>				
<b>State of Nebraska</b>				
	Taylor Ghee	402-471-1970	402-499-8351	taylor.ghee@nebraska.gov

## 2. BACKGROUND

The revised Keystone XL Project (KXL Project) is a proposal to construct and operate a 36-inch pipeline and related facilities project beginning in Hardisty, Alberta, Canada proceeding to the international border and continuing into the United States, to transport crude oil from the Western Canadian Sedimentary Basin and the Williston Basin to existing pipeline facilities near Steele City, Nebraska (Figure 1). The previously proposed KXL Project extended further south to the Gulf Coast, but the portion from Steele City to the Gulf Coast was determined to have independent utility and is no longer a part of the current KXL Project. The current KXL Project would cross Montana, South Dakota, and Nebraska, all located within the Corps' Omaha District (NWO), while avoiding the Sandhills region in Nebraska. The KXL Project is anticipated to be 875 miles long within the continental U.S., and has an initial capacity of 830,000 barrels per day.

The KXL Project will cross rivers and wetlands and requires permits under Sections 404/10. Five Pre-Construction Notifications (PCNs) were received in NWO on May 30, 2017. A portion of the proposed pipeline will cross under the Missouri River and be trenched across federal property acquired and administered by the Corps for the Fort Peck Dam and Reservoir Project, Montana, south of the project. 33 U.S.C. 408 (Section 408) prohibits the modification of a federal flood control or navigation project without prior permission from the Corps. A Section 408 permission request was received in NWO on April 5, 2017.

The Section 408 request is separate from the Sections 404 / Section 10 Regulatory decision regarding the crossing under the Missouri River. Nationwide Permit, General Condition XX, requires Regulatory to not make its decision on this crossing until the Section 408 review and determination are complete. All other permit decisions associated with the





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# Communication Plan Keystone XL Pipeline

pipeline are subject to normal regulatory processes and timelines.

### 3. SITUATION

The Department of State (DOS) released the Final Environmental Impact Statement (FEIS) on August 26, 2011 for the previously proposed KXL Project that extended to the Gulf Coast. The President issued a memorandum to the DOS on January 18, 2012 resulting in a DOS denial of the Keystone XL Presidential Permit (PP) application. On May 4, 2012, TransCanada applied for a PP for the revised KXL Project, avoiding the Sandhills region. On June 12, 2012 the DOS issued its Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) and initiate consultation under Section 106 of the National Historic Preservation Act (NHPA) for the KXL. On July 9, 2012, NWO agreed to participate as a cooperating agency for the preparation of the SEIS. On January 31, 2014, the DOS released the Final SEIS (FSEIS). On November 6, 2015, President Obama rejected TransCanada's application for a PP to complete KXL. On January 24, 2017, President Trump signed the Presidential Memorandum Regarding Construction of the KXL, TransCanada submitted a new PP application to the DOS on January 26, 2017, and DOS subsequently approved the new PP on March 23, 2017.

Since the pipeline will cross federal property administered by both the Corps and the Bureau of Land Management (BLM), the Mineral Leasing Act authorizes the BLM to issue a right-of-way (ROW) grant for all federal property. It is the Corps opinion that the ROW grant may not be issued until the Corps makes the Section 408 decision. BLM is honoring this opinion. The Corps is reviewing the information provided by TransCanada to determine if it is sufficient to make a Section 408 decision at the Fort Peck crossing. If a decision is made that the action is not injurious to the public interest nor affect the project purposes, then the Corps would provide a Section 408 permission to BLM.

Corps Regulatory personnel are currently evaluating TransCanada's PCNs to determine if the information provided would allow verification of the Section 404/10 crossings under Nationwide Permit (NWP) 12. There were five PCNs originally submitted (MT-2, SD-1, NE-2), but the two PCNs in Nebraska have since been determine to not require a section 404 permit or nationwide verification. If the impacts associated with the remaining crossings exceed the NWP thresholds, Individual Permits would be required.

Applicant Submittal	Corps Review Time (Business Days)
PCNs submitted	May 30, 2017
PCNs reviewed	PCN 1 (Missouri River, Montana) – completed review PCN 2 (Yellowstone River, Montana) – completed review PCN 3 (Cheyenne River, South Dakota) – completed review PCN 4 (Niobrara River, Nebraska) – completed review PCN 5 (Platte River, Nebraska) – completed review
PCNs complete	PCN 1 – complete 16 August 2017 PCN 2 – complete 16 August 2017 PCN 3 – complete 21 June 2017 PCN 4 – no permit required 22 June 2017 PCN 5 – no permit required 22 June 2017
Verification of non-408 PCNs	PCN 2 PCN 3 – verified 4 August 2017
Verification of 408 PCN (one crossing in Montana)	PCN 1

#### Strengths

- Highly knowledgeable NWO Regulatory Branch
- BLM is lead federal agency for communications
- Department of State has completed a full Environment Impact Statement, Supplemental Environmental Impact Statement, and Tribal consultation under Section 106 of the NHPA.



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# Communication Plan Keystone XL Pipeline

- Strong NWO Section 408 team

## Weaknesses

- Uncertainty about public perception on the current alignment or pipelines in general
- Uncertainty of timeframe of pipeline

## Opportunities

- Possibility of a pro-active information stance to counter misinformation
- Possible communication with external entities, including other federal agencies, states and tribes.

## Threats

- Protests may be staged on Federal lands, including Corps-managed land at Fort Peck.
- Potential lawsuits under the Administrative Procedures Act (APA) concerning the Section 408 permission, BLM ROW grant or Section 404/10 verifications.
- Tribal opposition to pipelines; specifically impacts to water resources, cultural heritage and treaty rights

#### 4. STAKEHOLDERS / PARTNERS / TARGET AUDIENCES

USACE-level Stakeholders				
National	Administration	Congress	Fed Agencies	Internal/Army
HQUSACE	ASA(CW)	NE, SD, MT Delegations	EPA, FEMA	PA, MRRP, HQ
Bureau of Land Management	Department of Interior			PA
Department of State				PA
Department of Transportation			PHMSA	PA

Division (Regional)/District Stakeholders				
State Gov't	State Orgs	Local Gov't	Local Population	Interest Groups
Montana			All USACE Divisions	Tribal
South Dakota			All USACE Districts	Tribal
Nebraska			All USACE Districts	Tribal

#### 5. STRATEGIES

- Communicate accurate information in a timely and transparent manner.
- Allow BLM to lead communications for the ROW grant and general KXL Project topics.
- NWO PAO will lead communications for the Section 404/10 verifications.
- BLM, with assistance from the DoS, will be the communication lead for common issues (Section 106 compliance, Tribal consultation, FWS consultation and NEPA actions) between Section 408 and Sections 404/10.

#### 6. KEY MESSAGES

- USACE supports energy development done in accordance with EO 13604. We must meet immediate needs without sacrificing the future of the lands and waters for which we are responsible and the public enjoys.



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# Communication Plan Keystone XL Pipeline

- b) USACE is charged with supporting economic development and ensuring measures exist to minimize impacts to the environment, waters of the United States, and the authorized purposes for which the Missouri River Reservoirs are operated.
- c) Communicating and collaborating with the agencies that are responsible for permitting is important.
- d) Section 408 authorizes the Secretary of the Army to grant permission for the alteration or occupation of use of the project if the Secretary determines that the activity will not be injurious to the public interest and will not impair the usefulness of the project.
- e) The Omaha District regulates any work or structures in, over, or under navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899, which include the proposed crossings under the Yellowstone and Missouri Rivers in Montana.
- f) Additionally, the District regulates discharges of dredged or fill material into waters of the United States, including wetlands, under Section 404 of the Clean Water Act including activities proposed for the Cheyenne River in South Dakota.
- g) All current water crossings appear to be covered under NWP 12 as long as the applicant follows all required criteria. However, the Missouri, Yellowstone, and Cheyenne River crossings require verification from the Corps

## 7. TALKING POINTS

- a) The Bureau of Land Management is the lead agency for communications for the Keystone XL Pipeline. Please direct all questions to BLM, specifically Al Nash, [al\\_nash@blm.gov](mailto:al_nash@blm.gov).
- b) We are committed to working with all stakeholders and other federal and state agencies to meet our legal requirements under federal law.
- c) Preventing injury and loss of life on Corps-managed lands is the Corps first and top priority

## 8. EVALUATION

- Feedback from Stakeholders on products and use of products.
- Accuracy of Keystone XL information provided by USACE in media outlets
- Traffic on NWO's Keystone XL website
- Comments received by USACE staff from agencies/members of the public at public meetings, through our web site, etc.

## 9. ANTICIPATED FREQUENTLY ASKED QUESTIONS (FAQs)

### GENERAL:

**Q. Who is the final authority making the decision on the Section 408 permission? The Section 404/10 permits/verifications?**

A. The Commander of the Omaha District.

**Q. Were other alternatives considered?**

A. Yes, alternatives were addressed by the DoS in the final Supplemental EIS (FSEIS)

**Q. Where can I find copies of the FSEIS and other documents?**

A. The documents can be found on the Department of State website at <https://keystonepipeline-xl.state.gov/>.

**Q. Is there a possibility of one of the other alternatives being selected?**

A. BLM has the lead in providing the Record of Decision for the FSEIS.

**Q. Where is USACE in the process?**



# Communication Plan Keystone XL Pipeline

A. We are currently reviewing the documents provided by the applicant to determine if the information provided is sufficient to support decisions pertaining to Corps authorities under Section 408 and Sections 404/10.

**Q. Is there a scheduled timeline for completion?**

A. At this time, USACE does not have an estimated time of completion. The overall project timeline will be developed by TransCanada after all decisions are made by federal and state agencies tasked with providing permits and permissions.

*SECTION 404/10 PERMITTING:*

**Q: How many PCNs were originally sent to the Corps?**

A: The Corps received 5 PCNs on May 30, 2017.

**Q: Why are the two Nebraska PCNs no longer being reviewed?**

A: The two PCNs in Nebraska did not have placement of "fill" in wetlands or waters of the U.S.

**Q: How can a pipeline cross a river and not trigger Clean Water Act, Section 404?**

A: The applicant plans to horizontal directional drill (HDD) the pipe under the rivers. Corps review is needed if the river is a navigational river under the Rivers and Harbors Act, Section 10, or if there is "fill" activity.

**Q: Why aren't all wetland and river crossings submitted as PCNs?**

A: Many activities that involve placement of "fill" are already authorized under Nationwide permit 12. There are certain conditions that require pre-construction notification (PCN) prior to verification under Nationwide permit 12.

**Q: Where are the PCNs?**

A: PCN 1 - Missouri River in Montana  
PCN 2 - Yellowstone River in Montana  
PCN 3 - Cheyenne River in South Dakota  
PCN 4 - Niobrara River in Nebraska  
PCN 5 - Platte River in Nebraska

**Q: Where can I find more information on the PCNs?**

A: WEB: <http://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/KXL/>

*SECTION 408 DETERMINATION:*

**Q. When was the Corps requested to complete a Section 408 review?**

A. TransCanada submitted a request on April 5, 2017

**Q. What is the status of the section 408 review?**

A. We are currently reviewing the documents provided by the applicant to determine if alteration or occupation of the project will or will not be injurious to the public interest and impair the usefulness of the Fort Peck project.

**Q. What is involved in a Section 408 review?**

A. A review of the technical and environmental aspects of the project are completed to ensure the project is not injurious to the public interest or does not impair the usefulness of the Civil Works project, in this case the Fort Peck project.

*GOVERNMENT TO GOVERNMENT CONSULTATION:*

**Q. Has the Army Corps been in contact with the Ft Peck and Assiniboine Tribe?**

A. Our Tribal liaison works with all the tribes within the basin and has been involved since the beginning of the KXL process in 2010/2011.

**Q. Will the Tribes have input into the decision?**



# Communication Plan Keystone XL Pipeline

A. There have been multiple opportunities for Tribal governments to provide input since 2011.

**Q. Will you provide the contact information for those at TransCanada?**

A. Brendan Neal is the Point of Contact for TransCanada. He can be reached at 202-412-5483 or by e-mail at [Brendan\\_neal@transcanada.com](mailto:Brendan_neal@transcanada.com).

## SECTION 106 COMPLIANCE

**Q. Why wasn't the Missouri River Programmatic Agreement (MRPA) followed?**

A. The Corps has determined that the actions completed by the DOS meet the requirements of Section 106 and comply with the MR PA.

**Q. The FSEIS stated that the MRPA would be followed, but we were never allowed to consult. Why?**

A. The DOS distributed emails, mailed letters, conducted teleconferences, and also participated in face-to-face tribal consultation in group and individual settings to obtain information concerning historic properties that were of concern to Indian tribes. These efforts are summarized and documented in both the FSEIS as well as in Attachment G of the KXL PA-2013.

**Q. How did the Corps comply with the MRPA?**

A. Stipulation 8(A), Undertakings Review, of the MR PA states that "for those planned or anticipated undertakings not addressed through the Five-Year Plan, CRMPs, and Treatment Plans, the Corps shall comply with section 106 of the NHPA in accordance with 36 CFR part 800, subpart B." As a result of participating in the Section 106 process with the DOS and after review of the administrative record the Corps has determined that the actions completed by the DOS meet the requirements of Section 106 and comply with the MR PA. The Corps and other federal agencies agreed that the stipulations of the KXL PA-2013 would be implemented in order to take into account the effect of the undertaking on historic properties and to ensure actions are consistent with Section 106 of the NHPA.

## 10. APPENDICES

Appendix A: USACE Pipeline Public Affairs Guidance from HQUSACE

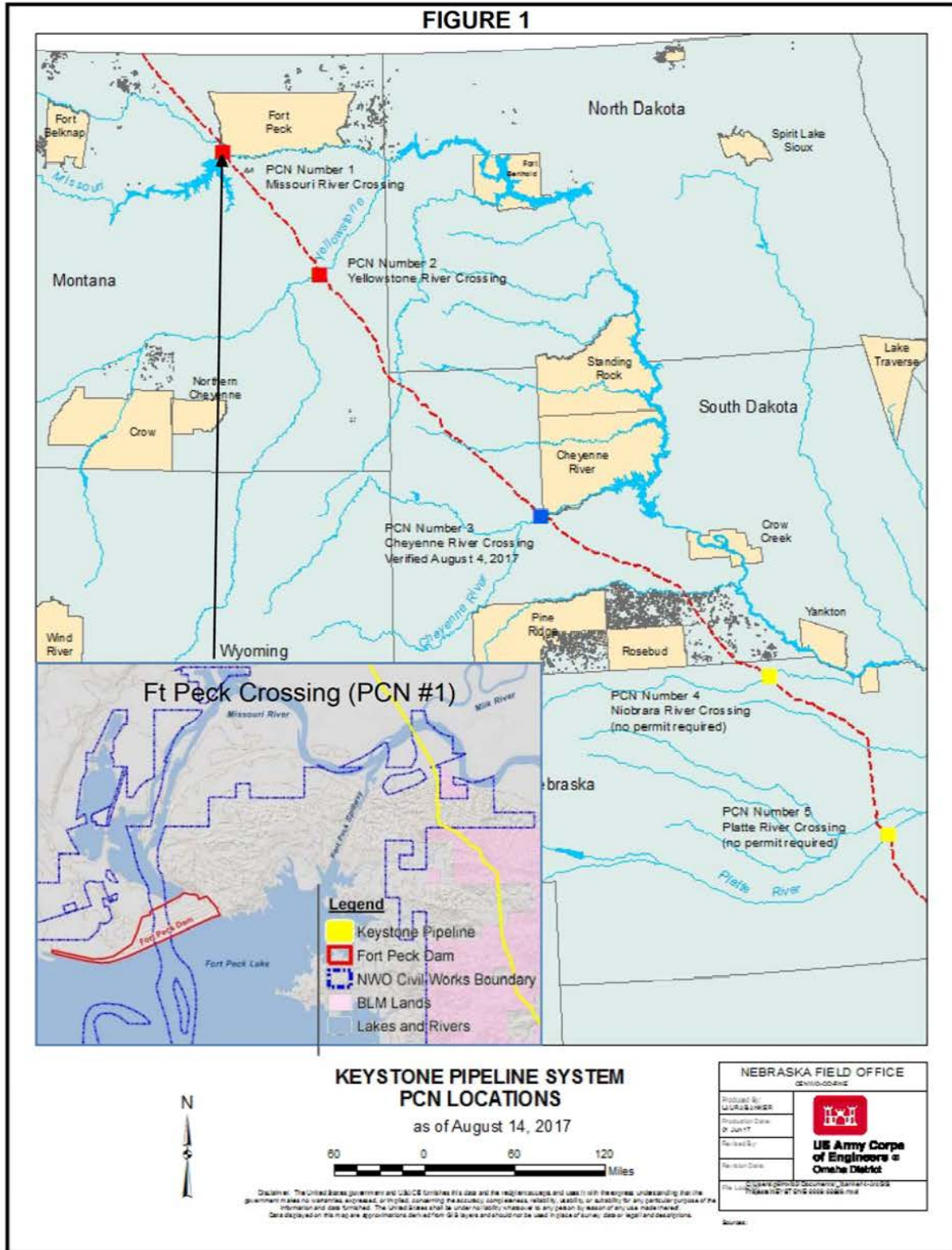


USACE Pipeline PAG



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# Communication Plan Keystone XL Pipeline



12/17/2018

DEPARTMENT OF THE INTERIOR Mail - Keystone XL - PAO coordination



Nash, Kim (AI) <knash@blm.gov>

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## Keystone XL - PAO coordination

1 message

---

**Carrasco, Catalina MAJ USARMY USACE (US)**

Mon, Apr 24, 2017 at 2:39

<Catalina.Carrasco@usace.army.mil>

PM

To: "tennyaz@state.gov" <tennyaz@state.gov>, "Hignight, Ryan B CPT USARMY CENWO (US)"

<Ryan.B.Hignight@usace.army.mil>, "Ohara, Thomas A III CIV USARMY (US)"

<Thomas.A.OHara@usace.army.mil>, "al\_nash@blm.gov" <al\_nash@blm.gov>, "Allen, Matthew"

<mrallen@blm.gov>

Cc: "Gaskill, Amy J CIV USARMY CENWD (US)" <Amy.J.Gaskill@usace.army.mil>, "Williamson, Eileen L CIV

USARMY CENWD (US)" <Eileen.L.Williamson@usace.army.mil>, "Sztalkoper, Kamil MAJ USARMY CEHQ

(US)" <Kamil.Sztalkoper@usace.army.mil>

All,

Thank you for taking time out of your busy schedules last week to discuss communication plan for the Keystone XL pipeline. The following are my notes from our conversation. Please let me know if I missed anything.

In the room:

Tom O'hara, Public Affairs Director, USACE -Omaha District

Capt. Ryan Hignight, PAO, USACE-Omaha District

Maj. Kamil Sztalkoper, Dep. Director, Public Affairs, USACE-HQ

Maj. Catalina Carrasco, PAO, USACE-HQ

On the phone:

Alexandra Tenny, Bureau of Energy Resources - Spokesperson, Dept. of State

AI Nash, Bureau of Land Management - Montana

Matthew R. Allen, Assistant Director for Communications, Bureau of Land Management

-----  
By law BLM issues permits for pipeline if:

1. It involves BLM land or
2. Involves multiple federal agencies.

KXL: under 50 miles on federal lands managed by BLM and USACE

-USACE's role is to issue a concurrence letter that says BLM that has followed all regulations, and concur and those lands are available or there are things need to be fixed.

-After that a notice of intent to proceed will be filed by BLM.

- All messaging should be done at the BLM, Montana level not at national level.

- All questions regarding concurrence will be send to USACE Omaha district

Intended public outreach: limited, news release and to be available for any media inquiries.

Do not want to be proactive with social media. But will respond as appropriate. Will not announce right away decision.

Current situation:

-BLM: has draft communication plan waiting to be approved, and goal is that messaging is kept at LOCAL level.

12/17/2018

DEPARTMENT OF THE INTERIOR Mail - Keystone XL - PAO coordination

-Dept. of State: Role has been completed, has been receiving inquiries, referring all to the website:  
<https://keystonepipeline-xl.state.gov/>

- No comment line has been established, but it's anticipated after construction begins as it most likely generate public interest

- There's no current protests planned and most likely won't happen until there's a definite physical place where protests can happen.

- There's no legal requirement to do any further public meetings. BLM is still considering the value of additional meetings, but none are planned at this time.

- Expectation of status of concurrence letter by USACE in June or early July 2017

- Ensure our leaders are informed, IOT keep it local.

Future planning:

- BLM DC has Quick response teams set up to assist to BLM local.

-USACE, State and BLM will prepare an integrated anticipated F.A.Q that can be shared across all sites.

- We should reach out to Dept. of Trans about pipeline

- All communication needs to stay down at local level. This will be elevated to federal level: once Secretary is at the podium or White House gets involved.

v/r

Catalina Carrasco  
MAJ, SC  
Public Affairs Officer  
HQ US Army Corps of Engineers  
Office: 202-761-0292  
Mobile: 202-309-5987

441 G St. NW Washington, DC 20314



12/17/2018

DEPARTMENT OF THE INTERIOR Mail - KXL Pipeline - communications update



Nash, Kim (AI) &lt;knash@blm.gov&gt;

## KXL Pipeline - communications update

1 message

**Carrasco, Catalina MAJ USARMY USACE (US)**

Mon, Jun 12, 2017 at 2:59

&lt;Catalina.Carrasco@usace.army.mil&gt;

PM

To: "tennyaz@state.gov" <tennyaz@state.gov>, "Hignight, Ryan B CPT USARMY CENWO (US)" <Ryan.B.Hignight@usace.army.mil>, "Ohara, Thomas A III CIV USARMY (US)" <Thomas.A.OHara@usace.army.mil>, "al\_nash@blm.gov" <al\_nash@blm.gov>, "Allen, Matthew" <mrallen@blm.gov>, "Gaskill, Amy J CIV USARMY CENWD (US)" <Amy.J.Gaskill@usace.army.mil>, "Bowers, Caleb J CPT USARMY CEHQ (US)" <Caleb.J.Bowers@usace.army.mil>, "knash@blm.gov" <knash@blm.gov>, "jmoor@blm.gov" <jmoor@blm.gov>, "Pawlik, Eugene A Jr CIV USARMY CEHQ (US)" <Eugene.A.Pawlik@usace.army.mil>  
Cc: "paul\_ross@ios.doi.gov" <paul\_ross@ios.doi.gov>, "mcrandal@blm.gov" <mcrandal@blm.gov>

All,

I apologize for not sending this much sooner. Below you'll see my notes from our call on June 1st.

I did however, wanted to bring up an item. Our Director for Civil Works, Mr. James Dalton, received a phone call last week from Ms. Hassle at the department of State with some concerns to including our communications efforts, and I just want to make sure that if there are additional concerns all of us are made aware of them ASAP. We definitely want to make sure that all of our organizations have a unified message.

-----Notes-----

Mr. AI Nash from BLM gave an update:

- Still waiting for materials from USACE before we move forward
- Concurrence letter is expected sometime during early fall or late summer
- There have been motions filed by TransCanada to ask court to dismiss lawsuits.

**(b)(5) Deliberative Process**

- There's a need to establish a good relationship in both states, with the counties and local community.
- Federal agencies do not want (and should not) be front and center.

Mr. Tom O'hara, Omaha District:

- Starting to receive congressional inquiries.
- Timeline of concurrence letter sliding to fall.
- There's pressure to have a communications plan ready. USACE's Omaha District will develop a rough draft, which will send to HQ for review and then send to BLM and State Dept. in order to develop a "one-voice" message.

Mr. Matthew Allen:

- Requested that we start adding Department of Interior to our calls: Paul Ross, DOI Communications Megan Crandall, BLM Spokesperson

Additional:

- USACE HQs is still waiting chief counsel's approval on Pipeline PAG.
- Next call is scheduled for 11 July, I will send out an outlook invite to everyone.

Hope I didn't miss any key points. Thanks for everyone's participation.

12/17/2018

DEPARTMENT OF THE INTERIOR Mail - KXL Pipeline - communications update

v/r

Catalina Carrasco  
MAJ, SC  
Public Affairs Officer  
HQ US Army Corps of Engineers  
Office: 202-761-0292  
Mobile: 202-309-5987

441 G St. NW Washington, DC 20314

12/17/2018

DEPARTMENT OF THE INTERIOR Mail - UPDATE/ADDITIONS TO JOINT KXL COMS PLAN (S: Mon Sept 18) (UNCLASSIFIED)



Nash, Kim (AI) <knash@blm.gov>

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## UPDATE/ADDITIONS TO JOINT KXL COMS PLAN (S: Mon Sept 18) (UNCLASSIFIED)

1 message

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**Ohara, Thomas A III CIV USARMY (US)** <Thomas.A.OHara@usace.army.mil> Fri, Sep 8, 2017 at 9:19 AM  
To: "Hignight, Ryan B CPT USARMY CENWO (US)" <Ryan.B.Hignight@usace.army.mil>, "tennyaz@state.gov" <tennyaz@state.gov>, "al\_nash@blm.gov" <'al\_nash@blm.gov'>, "Allen, Matthew" <mrallen@blm.gov>, "Bowers, Caleb J CPT USARMY CEHQ (US)" <Caleb.J.Bowers@usace.army.mil>, "knash@blm.gov" <knash@blm.gov>, "jmoor@blm.gov" <jmoor@blm.gov>, "Pawlik, Eugene A Jr CIV USARMY CEHQ (US)" <Eugene.A.Pawlik@usace.army.mil>, "mcrandal@blm.gov" <mcrandal@blm.gov>, "paul\_ross@ios.doi.gov" <paul\_ross@ios.doi.gov>, "Carrasco, Catalina MAJ USARMY USACE (US)" <Catalina.Carrasco@usace.army.mil>, "Gaskill, Amy J CIV USARMY CENWD (US)" <Amy.J.Gaskill@usace.army.mil>, "Campos, Vincent M" <CamposVM@state.gov>, "Blass, Michael S CIV USARMY CENWO (US)" <Michael.S.Blass@usace.army.mil>, "Glasch, Michael A CIV USARMY USAG (US)" <Michael.A.Glasch@usace.army.mil>

CLASSIFICATION: UNCLASSIFIED

ALCON

As discussed – here is the Corps specific component of a joint COMS plan. If all can add their agency/top level messaging/plan, we can mature this as a joint document.

Please send updates/additions to MATTHEW ALLEN NLT Monday, Sept 18.

v/r

T3

BUILDING STRONG

Thomas A. O'Hara III

Public Affairs Director

Omaha District, U.S. Army Corps of Engineers

1616 Capitol Avenue, Suite 9000

(Attn: CENWO-PA)

Omaha, NE 68102-4901

402-995-2416

[thomas.a.ohara@usace.army.mil](mailto:thomas.a.ohara@usace.army.mil)

"Keep Calm and Essayons"

12/17/2018

DEPARTMENT OF THE INTERIOR Mail - UPDATE/ADDITIONS TO JOINT KXL COMS PLAN (S: Mon Sept 18) (UNCLASSIFIED)

-----Original Appointment-----

**From:** Hignight, Ryan B CPT USARMY CENWO (US)

**Sent:** Thursday, August 31, 2017 2:38 PM

**To:** Hignight, Ryan B CPT USARMY CENWO (US); 'tennyaz@state.gov'; Ohara, Thomas A III CIV USARMY (US); 'al\_nash@blm.gov'; 'Allen, Matthew'; Bowers, Caleb J CPT USARMY CEHQ (US); 'knash@blm.gov'; jmoor@blm.gov; Pawlik, Eugene A Jr CIV USARMY CEHQ (US); mcrandal@blm.gov; paul\_ross@ios.doi.gov; Carrasco, Catalina MAJ USARMY USACE (US); Gaskill, Amy J CIV USARMY CENWD (US); 'Campos, Vincent M'; Blass, Michael S CIV USARMY CENWO (US); Glasch, Michael A CIV USARMY USAG (US)

**Subject:** Accepted: KXL Communications Call (UNCLASSIFIED)

**When:** Friday, September 08, 2017 10:00 AM-11:00 AM (UTC-06:00) Central Time (US & Canada).

**Where:** (b) (6) and the access code is (b) (6)

CLASSIFICATION: UNCLASSIFIED

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