



August 21, 2018

VIA ELECTRONIC MAIL

Dionne Hardy
FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503
OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Request

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and implementing regulations for the Office of Management and Budget (OMB), 5 C.F.R. Part 1303, American Oversight makes the following request for records.

Senators Elizabeth Warren and Sherrod Brown sent OMB a letter on June 18, 2018 requesting records related to Associate Director Kathy Kraninger's involvement with the Department of Justice (DOJ) Zero-Tolerance Policy for Criminal Illegal Entry and resulting actions and policies involving DOJ and the Department of Homeland Security (DHS).¹ These policies resulted in the separation of over 2,700 children from their parents.² Associate Director Kraninger oversees OMB's policy and management guidance for DOJ and DHS.³ Ms. Kraninger has now been nominated to lead the Consumer Financial Protection Bureau.

American Oversight seeks records to shed light on Ms. Kraninger's involvement in the implementation of DOJ's Zero-Tolerance Policy for Criminal Illegal Entry, or any other policy related to the separation of parents facing prosecution for unlawful entry from their children.

Requested Records

American Oversight requests that OMB produce the following within twenty business days:

¹ Ltr. from Senators Elizabeth Warren & Sherrod Brown to Office of Management and Budget Associate Director Kathy Kraninger, June 18, 2018, <https://www.warren.senate.gov/imo/media/doc/Kraninger%20Letter%20Final%206.18.18.pdf>.

² Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (June 15, 2018, 12:03 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>.

³ *Supra* note 1.



All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) concerning DOJ's Zero-Tolerance Policy for Criminal Illegal Entry, or any other actual or potential policy related to the separation of parents facing prosecution for unlawful entry from their children,⁴ between OMB Associate Director Kathy Kraninger and any official or employee of the Department of Justice (DOJ), the Department of Homeland Security (DHS), or the Department of Health and Human Services (HHS).

Please provide all responsive records from the date of March 1, 2017, to the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If OMB uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁵ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been**

⁴ The request encompasses policies related to the custody of and care for children classified as unaccompanied minors following family separation.

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁶

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered OMB’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁷ Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files.** For example, a custodian may have deleted a responsive email from his or her email program, but OMB’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that OMB use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁸ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is

⁶ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁷ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”⁹ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹⁰ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹¹

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹² Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, OMB is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and OMB can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 5 C.F.R. § 1303.70, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹² *Mead Data Central*, 566 F.2d at 261.

significant way.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

American Oversight requests a waiver of fees as disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government. The request relates to identifiable operations and activities of the federal government, namely the communications and actions of OMB concerning significant law enforcement and immigration policies that have drawn extensive media coverage.¹⁵ For similar reasons, the requested disclosures will enhance the public's understanding to a significant extent. American Oversight will convey information obtained through this request to the general public via its website and social media accounts.

This request is primarily and fundamentally not for commercial purposes. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's commercial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on its website and promote their availability on social media platforms, such as Facebook and Twitter.¹⁶ One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its "Audit the Wall" effort, where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.¹⁷

Accordingly, American Oversight qualifies for a fee waiver.

¹³ 5 C.F.R. § 1303.70.

¹⁴ *Id.*

¹⁵ See, e.g., Katie Reilly, *Nearly 2,000 Children Have Been Separated From Their Families During Trump Border Crackdown*, TIME, June 16, 2018, <http://time.com/5314128/trump-immigration-family-separation-2000-children/>; Jennifer Epstein, *Bipartisan Senate Report Finds President Trump's Policies Made Reuniting Migrant Families More Difficult*, TIME, Aug. 16, 2018, <http://time.com/5368642/senate-report-trump-family-separation-tracking-children-worse/>; Richard Gonzales, *Sessions Says 'Zero Tolerance' for Illegal Border Crossers, Vows to Divide Families*, NPR (May 7, 2018, 8:17 PM), <https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>.

¹⁶ American Oversight currently has approximately 11,900 page likes on Facebook, and 44,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited August 17, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited August 17, 2018).

¹⁷ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Dan McGrath at foia@americanoversight.org or 202-897-4213. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight