AMERICAN OVERSIGHT

October 18, 2018

VIA ELECTRONIC MAIL

Freedom of Information Officer
Administration for Children & Families
U.S. Department of Health and Human Services
330 C Street SW
Washington, DC 20201
FOIA@acf.hhs.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, American Oversight makes the following request for records.

In April, 2018, the Department of Justice implemented a "zero tolerance" policy for individuals crossing the Southwest border without authorization, resulting in the Department of Homeland Security separating at least 2,342 children from their parents or guardians and placing them into the care of the Department of Health and Human Services' Office of Refugee Resettlement (ORR).[1] On June 21, 2018, the Associated Press reported allegations of abuse at one of three "secure placement" facilities with which ORR contracts to house unaccompanied minors who have "had problems at less-restrictive housing."[2] One youth who had been held at the Shenandoah Valley Juvenile Detention Center alleged that he had been restrained in a chair with a bag over his head, and a child-development specialist who had worked in the facility reported seeing children with bruises and broken bones. A subsequent investigation by the Virginia Department of Juvenile Justice found that the chair restraint was used at the facility but found "no evidence of abuse or neglect."[3]

---

[1] *With Thousands of Children Still Separated, Deadline to Reunite Immigrants Quickly Approaching*, CBS NEWS (July 6, 2018, 8:54 A.M.), https://www.cbsnews.com/news/with-thousands-of-children-still-separated-deadline-to-reunite-immigrants-quickly-approaching/.

[2] *Young Immigrants Detained in Virginia Allege They Were Beaten While Cuffed, Left Nude in Cells*, CBS NEWS (June 21, 2018, 10:44 A.M.), https://www.cbsnews.com/news/shenandoah-valley-juvenile-center-virginia-young-immigrant-detainees-allege-beaten-stripped-of-clothes-strapped-to-chairs/.

[3] COMMONWEALTH OF VIRGINIA, Secretary of Public Safety and Homeland Security, *Virginia Department of Juvenile Justice Report of Findings: Shenandoah Valley Juvenile Center*, Aug. 13,

American Oversight submits this request to shed light on the conditions to which immigrant children are subject at such facilities.

Requested Records

American Oversight requests that the Administration for Children and Families (ACF) produce the following within twenty business days:

1. Records sufficient to show the number of, age, sex, length of detention, and reason for placement of minors in the care of the Office of Refugee Resettlement (ORR) housed at the Shenandoah Valley Detention Center, the Yolo County Juvenile Detention Facility, the Northern Virginia Juvenile Detention Center, and any other "secure placement" facility for unaccompanied alien children (UACs) between April 1, 2017, and the date of search.

2. Records reflecting any complaints of physical or emotional abuse at any of the three facilities listed in Part 1 of this request or any other "secure placement" facility that ORR has received since October 1, 2008.

3. Records sufficient to show any policies or best practices that ORR follows to move UACs out of secure placement and into residential settings.

4. Any records responsive to Sen. Mark Warner and Sen. Tim Kaine's June 22, 2018 letter to ORR.[4]

5. All photographs, videos or audio recordings taken in any inspections by ORR of any facility holding UACs between April 1, 2018 and the date of search.

6. All email chains including any photographs, videos, or audio recordings of facilities housing UACs sent by or to any political appointee—including where any political appointee is copied (cc'd) or blind copied (bcc'd) on any email—in the head office of ORR between January 1, 2017, and the date of search.

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 HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they

---

2018, https://www.governor.virginia.gov/media/governorvirginiagov/secretary-of-public-safety-and-homeland-security/pdf/Virginia-DJJ-Report-of-Findings.pdf.

[4] Sen. Mark R. Warner, Press Release, *Warner & Kaine Press HHS for Information on Staunton Detention Center*, June 22, 2018, https://www.warner.senate.gov/public/index.cfm/pressreleases?id=2A68A9FD-7F9B-46B5-AD39-E587D9890542.

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 are 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 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 HHS'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**

---

[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).

[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.

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 HHS's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that HHS 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 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, HHS 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

---

[8] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).
[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) (emphases 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.

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 HHS 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 45 C.F.R. § 5.54, 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 government operations by the general public in a significant way.[13] Moreover, the request is primarily and fundamentally for non-commercial purposes.[14]

American Oversight requests a waiver of fees because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."[15] There has been extensive media coverage of and public attention on the administration's policy of separating immigrant parents and children when they cross at the border,[16] including with regard to allegations of abuse of immigrant children.[17] The public has a great interest in knowing how immigrant children are being treated after they enter the country, and this request thus goes directly to those actions by the federal government. Moreover, the requested records will significantly increase the general public's understanding of the efforts to reunite families separated at the border.

---

[13] 45 C.F.R. § 5.54(a).
[14] *Id.*
[15] 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).
[16] *See* Tim Arango & Kayla Cockrel, *Marches Across the U.S. Protest Separation of Migrant Families*, N.Y. TIMES, June 14, 2018, https://www.nytimes.com/2018/06/14/us/protest-marches-family-separation.html; Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents*, NEW YORKER, May 30, 2018, https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents; Molly Hennessy-Fiske, *U.S. Is Separating Immigrant Parents and Children to Discourage Others, Activists Say*, L.A. TIMES (Feb. 20, 2018, 3:00 AM), http://www.latimes.com/nation/la-na-immigrant-family-separations-2018-story.html; Tal Kopan, *DHS: 2,000 Children Separated at Border*, CNN (June 15, 2018, 6:24 PM), https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html.
[17] *See, e.g.*, Agnel Philip, *Arizona Southwest Key Shelter Was Closed Because Staff Abused Kids, Feds Say*, AZCENTRAL.COM (Oct. 9, 2018, 6:08 P.M.), https://www.azcentral.com/story/news/politics/immigration/2018/10/09/southwest-key-migrant-shelter-closed-because-staff-abused-kids-feds-say/1582641002/.

This request is primarily and fundamentally for non-commercial purposes.[18] 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 financial 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 uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.[19] American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,[20] American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.[21] As another example, American Oversight has a project called "Audit the Wall," 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.[22]

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with ACF 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 Hart Wood at foia@americanoversight.org or 202.873.1743. 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,

[18] 45 C.F.R. § 5.54(b)(3)(i)-(ii).

[19] American Oversight currently has approximately 11,900 page likes on Facebook, and 45,300 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Oct. 18, 2018); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Oct. 18, 2018).

[20] *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.

[21] *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents.

[22] *Audit the Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall.

Austin R. Evers
Executive Director
American Oversight