



November 16, 2018

VIA ELECTRONIC MAIL

Freedom of Information Officer
Department of Health & Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@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.

On October 17, 2018, Senators Elizabeth Warren and Ron Wyden wrote to HHS Secretary Alex M. Azar seeking answers after a Department of Homeland Security (DHS) Inspector General report indicated that Secretary Azar had misled Congress about HHS's efforts to reunite children separated from their parents and guardians at the southern border as a result of the administration's "zero tolerance" policy.¹

On June 23, 2018, HHS had published a press release claiming that there was "a central database" used by HHS and DHS to track children separated from their parents.² In June 26, 2018, testimony to the Senate Finance Committee, Mr. Azar said that there was "no reason why any parent would not know where their child is located," claiming that an online database allowed HHS to locate any child "within seconds."³

¹ Letter from Sen. Elizabeth Warren & Sen. Ron Wyden to Secretary Azar (Oct. 17, 2018), <https://www.wyden.senate.gov/imo/media/doc/101818%20Letter%20to%20Azar%20OIG%20Report%20Child%20Separation.pdf>.

² HHS, Press Release, *Zero-Tolerance Prosecution and Family Reunification* (June 23, 2018), <https://www.hhs.gov/about/news/2018/06/23/zero-tolerance-prosecution-and-family-reunification.html>.

³ Sarah Karlin-Smith, *Health Secretary: 'No Reason' Why Separated Families Can't Find Children* (June 26, 2018, 11:03 AM), <https://www.politico.com/story/2018/06/26/azar-separated-families-673186>.



The Inspector General’s report, released on September 27, 2018, found “no evidence that such a database exists.” The Inspector General added: “Two officials suggested that the ‘central database’ referenced in DHS’ announcement is actually a manually-compiled spreadsheet maintained by HHS, CBP, and ICE personnel. According to these officials, DHS calls this spreadsheet a ‘matching table.’”⁴

This request seeks records relating to the senators’ inquiries in order to shed light on the process by which HHS kept track of the children in its care and to determine whether HHS misled the American public on an issue of widespread concern and national importance.

Requested Records

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

1. All email communications and associated attachments sent or received by any custodian listed below, including emails on which any custodian is copied (cc’d) or blind copied (bcc’d), that contain the term “matching table.”

Please produce all responsive records from June 18, 2018, through June 28, 2018.

2. All email communications and associated attachments sent or received by any custodian listed below, including emails on which any custodian is copied (cc’d) or blind copied (bcc’d), that contain any of the following terms:
 - a. SFC
 - b. Senate
 - c. “Finance Committee”
 - d. Wyden
 - e. portal
 - f. database
 - g. matching
 - h. testi*

Please produce all responsive records from June 26, 2018, through June 28, 2018.

3. All talking points and briefing books produced for Secretary Azar in preparation for his June 26, 2018 testimony to the Senate Finance Committee.

HHS is in the best position to know who is likely in possession of records responsive to this request, but we ask that HHS search at a minimum:

- a. Secretary Alex Azar and any confidential assistants or schedulers acting on his behalf.

⁴ DHS, Office of Inspector General, Special Review, *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, Sept. 27, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

- b. Chief of Staff Peter Urbanowicz and any confidential assistants or schedulers acting on his behalf.
- c. Deputy Secretary Eric D. Hargan and any confidential assistants or schedulers acting on his behalf.
- d. Deputy Chief of Staff Brian Harrison and any confidential assistants or schedulers acting on his behalf.

Please note that American Oversight is using the asterisk (*) to designate the standard use of “wildcards” in the search for responsive records. For example, a search for “testi*” would return all of the following: testify, testimony, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

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 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

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

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 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

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).

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).

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 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

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.

¹³ 45 C.F.R. § 5.54(a).

¹⁴ *Id.*

¹⁵ 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

public attention on the administration’s policy of separating immigrant parents and children when they cross at the border,¹⁶ including significant concern that separated families will not be reunited.¹⁷ The public deserves to know how HHS is working to ensure that separated families can be reunited, and this request goes directly to relevant activities 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.

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

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 Catherine Shoichet, *171 Kids from Separated Families Are Still in Custody. Most Won’t Be Reunited with Their Parents.*, CNN (Nov. 8, 2018, 8:22 PM), <https://www.cnn.com/2018/11/08/politics/separated-families-reunification-update/index.html>.

¹⁸ 45 C.F.R. § 5.54(b)(3)(i)-(ii).

¹⁹ American Oversight currently has approximately 11,900 page likes on Facebook, and 45,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 16, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 16, 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>.

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 HHS 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,

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

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