



February 8, 2019

VIA ELECTRONIC MAIL

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, DC 20528-0655
foia@hq.dhs.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

The deaths of people held in the custody of DHS components have become an issue of significant public concern. On December 5, 2018, Senators Harris, Heinrich and Udall sent a letter to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) calling for the release of information and reports regarding the death of Roxsana Hernandez, a transgender detainee who died while in ICE custody, shortly following her detention by CBP.¹ This letter followed reports that transgender and pregnant detainees have not been provided with adequate medical attention while detained. Media outlets have reported that detained pregnant women have been shackled around the stomach and denied access to medication,² while transgender detainees have reportedly faced abuse. Other reports have also indicated that DHS

¹ Ltr. From Sens. Kamala Harris, Tom Udall & Martin Heinrich to Ronald Vitiello, Acting Dir., U.S. Immigration and Customs Enforcement & Kevin McAleenan, Commissioner, U.S. Customs & Border Protection, Dec. 5, 2018,

<https://www.harris.senate.gov/imo/media/doc/12.05.18%20Roxana%20Hernandez%20letter%5b1%5d.pdf>.

² Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018, 2:44 PM), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.



components have failed to provide adequate mental health services, as evidence by the death of Mergensana Amar.³

Ms. Hernandez's death preceded the high-profile deaths of children held in DHS custody, including the death of 7-year-old Jakelin Caal Maquin following her detention by CBP. Despite media attention and Congress's clear interest in deaths occurring in DHS custody, CBP Commissioner McAleenan failed to mention the death of Jakelin Caal Maquin in his testimony before the Senate Judiciary Committee on December 11, 2018, even though he had already been informed of her death.⁴ Since McAleenan's testimony, Secretary Nielsen and Commissioner McAleenan have made several public statements⁵ regarding Jakelin Caal Maquin, but no report has been released on the circumstances of her death.

Reports on the deaths of Hernandez, Jakelin Caal Maquin, and others who have died in DHS custody, have not been released. Accordingly, it is in the public interest to understand how DHS has investigated deaths occurring in its custody, as well as understand the policies and training procedures currently in place with regard to care for transgender and pregnant detainees.

American Oversight seeks records with the potential to shed light on DHS (and its component agencies) treatment of vulnerable detainees, including actions DHS officials have taken to address serious threats to the life of people DHS has detained.

Requested Records

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

1. All final talking points prepared for, or used by, DHS Secretary Kirstjen Nielsen for her December 20, 2018 testimony before the U.S. House of Representatives Judiciary Committee.
2. 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, calendar 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) of current Secretary Nielsen (formerly chief of staff) regarding any and all deaths of

³ Maria Sachetti, *ICE Detainee Hanged Himself After Being Taken off Suicide Watch*, WASH. POST, Nov. 29, 2018, https://www.washingtonpost.com/local/immigration/ice-detainee-hanged-himself-after-being-taken-off-suicide-watch/2018/11/28/67a62e74-edb8-11e8-baac-2a674e91502b_story.html?utm_term=.cabefc2a88d6.

⁴ Anne Flaherty & Wil Cruz, *Border Patrol Head Didn't Tell Congress About Jakelin Caal Maquin to Avoid 'Politicizing' Girl's Death*, ABC NEWS (Dec. 16, 2018, 4:49 PM), <https://abcnews.go.com/beta-story-container/US/border-patrol-head-congress-jakelin-caal-maquin-avoid/story?id=59849324>.

⁵ Leandra Bernstein, *DHS Officials Reveal Details Surrounding the Death of 7-year-old Migrant Girl*, KUTV (Dec. 14, 2018), <https://kutv.com/news/nation-world/many-questions-after-young-migrant-girl-dies-in-cbp-custody>.

individuals while held in DHS custody (including in the custody of ICE or CBP) or following detention in DHS custody, including, but not limited to, records related to the deaths of Jakelin Caal Maquin and Felipe Gomez Alonzo.

Please provide all responsive records from January 20, 2017, through the date of the 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 your agency 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.**⁷

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.⁶ **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.**⁷

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 your

⁶ 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).

⁷ 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)).

agency'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.⁸ 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 your agency's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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.”⁹ 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.”¹⁰ 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.”¹¹ 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.’”¹²

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.¹³ 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.

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹¹ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹² *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)).

¹³ *Mead Data Central*, 566 F.2d at 261.

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, your agency 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 your agency before it undertakes a search or incurs search or duplication costs. By working together at the outset, American Oversight and your agency 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 6 C.F.R. § 5.11(k), 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 significant way.¹⁴ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁵

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.”¹⁶ This request relates directly to the work of DHS and its components CBP and ICE, including some of the most important responsibilities of the Department—the safety and care of the individuals it has detained and deprived of liberty. This request seeks records that would shed light on how DHS is treating people it has detained, and how the Department responds when the life and safety of detainees is threatened. These are matters of significant public and congressional concern,¹⁷ and the requested records will provide the public with information necessary to hold DHS accountable for its actions and policies. And, as discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

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

¹⁴ 6 C.F.R. § 5.11(k)(1)(i).

¹⁵ 6 C.F.R. § 5.11(k)(1)(ii).

¹⁶ 6 C.F.R. § 5.11(k)(1)(i); *see also* 6 C.F.R. § 5.11(k)(2)(i)–(iv).

¹⁷ *See supra* note 1; O’Connor & Prakash, *supra* note 2; Flaherty & Cruz *supra* note 4.

¹⁸ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)–(ii).

other media. American Oversight also makes materials it gathers available on its public website and promote 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, American Oversight promptly posted the records to its website²⁰ 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 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,



Austin R. Evers
Executive Director
American Oversight

¹⁹ American Oversight currently has approximately 12,100 page likes on Facebook and 49,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 8, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 8, 2019).

²⁰ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, 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>.