AMERICAN OVERSIGHT

March 8, 2019

VIA EMAIL

Sam Kaplan
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

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
ICE-FOIA@dhs.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

As revealed by recently uncovered documents, U.S. Customs and Border Protection (CBP) created a database of journalists, attorneys, activists, and other individuals connected to the so-called migrant caravan, which federal agents used in order to place alerts on some passports of individuals listed and compile dossiers featuring highly personal information.[1] The individuals logged in the database include "ten journalists, seven of whom are U.S. citizens, a U.S. attorney, and 47 people from the U.S. and other countries, labeled as organizers, instigators, or "unknown" roles, among others.[2]

The documents retrieved by NBC are titled "San Diego Sector Foreign Operations Branch: Migrant Caravan FY-2019, Suspected Organizers, Coordinators, Instigators and Media" and are dated January 9, 2019.[3] The screenshots of the database, which is maintained on Microsoft SharePoint, show names and photos of individuals listing their date of birth, country of commencement, role in relation to the caravan, and fields indicating if alerts have been placed on

[1] Tom Jones et al., *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC San Diego (Mar. 6, 2019, 3:57 PM), https://www.nbcsandiego.com/news/local/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html.
[2] *Id.*
[3] *Id.*

their passports.[4] "X"s over individual photos indicate if they were arrested, interviewed, or had their visa or SENTRI pass revoked. In addition to the database, the agents created dossiers on each individual, even including in some cases, the name of the individual's mother.[5]

American Oversight seeks records with the potential to shed light on the creation, maintenance and use of the database tracking journalists, attorneys, activists, and others tied to the migrant caravan.

Requested Records

American Oversight requests that the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) produce within twenty business days:

1. All records regarding the tracking and investigation of organizers, coordinators, instigators, journalists, photographers, lawyers, and/or immigration advocates in relation to a "migrant caravan," including but not limited to the San Diego Sector Foreign Operations Branch's "Migrant Caravan FY-2019: Suspected Organizers, Coordinators, Instigators, and Media" SharePoint database.[6]

2. All email communications and associated attachments between (1) any of the custodians below and (2) any employee or contractor of CBP between October 1, 2018, and the date the search is conducted, containing any of the following terms:

    a. journalist
    b. photographer
    c. instigator
    d. antifa
    e. reporter
    f. "Suspected Organizers"
    g. "ILU-OASISS OMEGA"
    h. "Nicole Ramos"
    i. "Nicole Elizabeth Ramos"
    j. "Nicole E. Ramos"
    k. "Ramos, Nicole"

    American Oversight requests that DHS search the records of all political appointees* within the Office of the Secretary and the Office of the Deputy Secretary.

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[4] Tom Jones et al., *PHOTOS: Leaked Documents Show Government Tracking Journalists, Immigration Advocates*, NBC San Diego (Mar. 7, 2019), https://www.nbcsandiego.com/multimedia/PHOTOS-Leaked-Documents-to-NBC-7-Investigates-506782041.html.

[5] *Id.*

[6] *See* Jones et al., *supra* note 4.

American Oversight requests that ICE search the records of all political appointees* within the Office of the Director, the Office of the Deputy Director, and Homeland Security Investigations.

*"Political appointee" should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

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.**

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.[7] **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.**[8]

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[7] *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).

[8] *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

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 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.**[9] **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."[10] 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."[11] 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."[12] 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.'"[13]

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

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related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

[9] 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.

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

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

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

[13] *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)).

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.[14] 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, you are 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, we 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.[15] Moreover, the request is primarily and fundamentally for non-commercial purposes.[16]

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."[17] Recently-uncovered documents have revealed that CBP is apparently tracking attorneys, journalists, advocates, and others tangentially associated with the so-called migrant caravan, including U.S. citizens. The American public has a significant interest in understanding the extent to which CBP is tracking and investigating non-immigrants, especially U.S. citizens, for merely being associated with immigration activity. The requested records would aid a broad audience in understanding the activities of the federal government with regard to citizen attorneys, journalists, and others. Moreover, disclosure of the requested

[14] *Mead Data Central*, 566 F.2d at 261.
[15] 6 C.F.R. § 5.11(k)(1)(i).
[16] 6 C.F.R. § 5.11(k)(1)(ii).
[17] 6 C.F.R. § 5.11(k)(1)(i), (2)(i)-(iv).

information will contribute to public understanding; as discussed below, American Oversight has the ability and intention to effectively convey the information it receives to the public.

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, American Oversight promptly posted the records to its website[20] 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 Hart Wood at foia@americanoversight.org or 202.873.1743. Also, if American

[18] 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).
[19] American Oversight currently has approximately 12,200 page likes on Facebook, and 51,100 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Mar. 7, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Mar. 7, 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.

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