



March 25, 2019

VIA ELECTRONIC MAIL & ONLINE PORTAL

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Re: Freedom of Information Act Request

Dear Freedom of Information Act Officers:

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.

In testimony before the House Homeland Security Committee on March 6, 2019, Secretary of Homeland Security Kirstjen Nielsen reported that she was not familiar with the term “toxic stress” as it relates to the effects of the administration’s policy of separating children from their parents at the southern border in the spring and summer of 2018. Asked by Rep. Lauren Underwood if she was familiar with the traumatic effects of such separations on children, Secretary Nielsen replied that “the trauma is part of journey to come up to the border illegally.”¹ Secretary Nielsen told Rep. Underwood that a commission currently analyzing this issue would make its findings public, but did not indicate if DHS had conducted any such analysis as it made the decision to go forward with family separations.

¹ Homeland Security Secretary Kirstjen Nielsen Testifies on Border Security, Mar. 6, 2019, *video available at* <https://www.c-span.org/video/?458250-1/homeland-security-secretary-kirstjen-nielsen-testifies-border-security>



American Oversight seeks to understand the extent to which DHS officials evaluated the potential and actual psychological impact on children before and after instituting a policy of increased prosecutions of border-crossers that resulted in the separation of children from their families, and the reported “pilot project”² of this policy in the El Paso sector.

Requested Records

American Oversight requests that DHS, ICE and CBP produce the following within twenty business days:

1. All analyses of the results of the “pilot program” of increased prosecutions of adults crossing the border in the El Paso district, including adults traveling with minor children, including any analyses of the impacts of that program on affected children.
2. All analyses of the effects of the “pilot program” of increased prosecutions of adults crossing the border in the El Paso district, including adults traveling with minor children, on those children’s psychological health.
3. All communications (including emails, email attachments, calendar invitations, calendar entries, meeting notices, meeting agendas, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) regarding the potential or actual impact of DHS’s separation of children from their parents as part of the administration’s “prosecution initiative” or any pilot program of that initiative, on the psychological health of the affected children.

American Oversight requests that DHS limit its search to political appointees* in the immediate office of the Secretary.

American Oversight requests that CBP limit its search to political appointees* in the immediate office of the Director, all political appointees* in the immediate office of the Chief of the U.S. Border Patrol, and any person serving in the capacity of Chief Patrol Agent of the El Paso Sector.

American Oversight requests that ICE limit its search to political appointees* in the immediate office of the Director.

Please provide all responsive records from January 20, 2017 through the date of search.

*“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

² Lisa Riordan Seville and Hannah Rappleye, *Trump admin ran ‘pilot program’ for separating migrant families in 2017*, NBC NEWS, June 29, 2018, <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>

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.³ **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.**⁴

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**

³ 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).

⁴ 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)).

on custodian-driven searches.⁵ 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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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.

⁵ 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>.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

⁹ *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)).

¹⁰ *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.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

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.”¹³ 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 the psychological risks associated with such detainment. These are matters of significant public and congressional concern,¹⁴ 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.

¹¹ 6 C.F.R. § 5.11(k)(1)(i).

¹² 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁴ *See* Melissa Healy, *The Long-Lasting Health Effects of Separating Children from Their Parents at the U.S. Border*, Los Angeles Times, June 20, 2018, <https://www.latimes.com/science/sciencenow/la-sci-sn-separating-children-psychology-20180620-story.html>; Dylan Gee, *I Study Kids Who Were Separated from Their Parents. The Trauma Could Change Their Brains Forever.*, Vox, June 20, 2018, <https://www.vox.com/first-person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children>; Steve Turnham, *Experts Say Psychological Impact of Family Separation on Par with Abuse*, ABC News, June 18, 2018, <https://abcnews.go.com/Politics/experts-psychological-impact-family-separation-par-abuse/story?id=55981817>.

This request is primarily and fundamentally for non-commercial purposes.¹⁵ 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 promote their availability on social media platforms, such as Facebook and Twitter.¹⁶ 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 website¹⁷ and published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁸ 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.¹⁹

Accordingly, American Oversight qualifies for a fee waiver.

¹⁵ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)-(ii).

¹⁶ American Oversight currently has approximately 12,200 page likes on Facebook and 54,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 25, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 25, 2019).

¹⁷ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁸ *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>.

¹⁹ *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 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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight