



July 27, 2020

VIA EMAIL

The Privacy Office
Privacy Office, Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, DC 20528-065
foia@hq.dhs.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 of the Department of Homeland Security (DHS), 6 C.F.R. Part 5, American Oversight makes the following request for records.

Following the police killing of George Floyd in Minneapolis on May 25, 2020, thousands of people have held daily protests in Portland, Oregon and nationwide. Law enforcement has sometimes responded to these protests with violence, including firing smoke canisters, pepper spray, and rubber bullets.¹ After six weeks of daily demonstrations, the Department of Homeland Security deployed federal agents to the city to suppress the protests, exacerbating concerns—including from Oregon's own government—about the use of excessive force against protesters.² The Oregon Attorney General and the American Civil Liberties Union Foundation of Oregon are both suing the federal government in response to possible civil rights violations committed by DHS officials.³

American Oversight seeks records with the potential to shed light on potential civil rights violations committed by federal authorities.

¹ Jonathan Levinson, *Portland Police Under Scrutiny for Dangerous Crowd Control Munitions*, OPB (July 2, 2020, 6:00AM), <https://www.opb.org/news/article/crowd-control-weaponsportland-police-rubber-foam-bullets-tear-gas/>.

² Gillian Flaccus, *Chaotic Protests Prompt Soul-Searching in Portland, Oregon*, Associated Press, July 15, 2020, <https://apnews.com/4533bdf304692961ece51a828a1f5600>.

³ Emily Gillespie & Rachel Siegel, *Oregon Attorney General Sues Federal Agencies for Allegedly Violating Protesters' Civil Rights*, Wash. Post (July 19, 2020, 1:52 AM), <https://www.washingtonpost.com/nation/2020/07/18/portland-oreland-ag-lawsuit/>.



Requested Records

American Oversight requests that the Office for Civil Rights and Civil Liberties (CRCL) produce the following records within twenty business days:

1. Complaints submitted to CRCL containing allegations that concern DHS activity or actions—including but not limited to the conduct of employees of any DHS component—regarding the response to protests in Portland, Oregon.
2. Complaints issued by CRCL in response to information submitted by DHS components or external entities containing allegations that concern DHS activity or action—including but not limited to the conduct of employees of any DHS component—regarding the response to protests in Portland, Oregon. An example of this type of complaint issued by CRCL is attached as Exhibit A to aid your search.

Please provide all responsive records from July 1, 2020, through the date the search is conducted.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 operations or activities of the government."⁴ The public has a significant interest in DHS officials' responses to civilians' exercise of protected first amendment activity. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether CRCL has received or issued complaints related to DHS's actions against protesters in Portland. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁵ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

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.⁶

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website.⁷ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to the Trump Administration’s contacts with Ukraine and analyses of those contacts;⁸ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;⁹ posting records received as part of American Oversight’s “Audit the Wall” project to gather and analyze information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁰ the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department’s process for issuing such waivers;¹¹ and posting records and

⁶ American Oversight currently has approximately 15,500 page likes on Facebook and 104,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited July 27, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited July 27, 2020).

⁷ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁸ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁹ See generally *The Trump Administration’s Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; see, e.g., *CDC Calendars from 2018 and 2019: Pandemic-Related Briefings and Meetings*, American Oversight, <https://www.americanoversight.org/cdc-calendars-from-2018-and-2019-pandemic-related-briefings-and-meetings>.

¹⁰ See generally *Audit the Wall*, American Oversight, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, American Oversight, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹¹ *DOJ Records Relating to Solicitor General Noel Francisco’s Recusal*, American Oversight, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>.

analysis of federal officials' use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹²

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹³ 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, by intent or through negligence, failed to meet their obligations.¹⁴
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide

¹² See generally *Swamp Airlines: Chartered Jets at Taxpayer Expense*, American Oversight, <https://www.americanoversight.org/investigation/swamp-airlines-private-jets-taxpayer-expense>; see, e.g., *New Information on Pompeo's 2017 Trips to His Home State*, American Oversight, <https://www.americanoversight.org/new-information-on-pompeos-2017-trips-to-his-home-state>.

¹³ 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).

¹⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

requirements to manage agency information electronically,¹⁵ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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

¹⁵ 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>.

responsive records to American Oversight, please also provide responsive material on a rolling basis.

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, 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 line extending to the left.

Austin R. Evers
Executive Director
American Oversight

EXHIBIT A

CRCL Short Form Complaint Number is 18-08-DHS-0342

Dear CBP and ICE Colleagues,

Based on the below account of a detainee death, CRCL has opened this matter as a Short Form Complaint involving both CBP and ICE.

On May 29, 2018, ICE ERO notified CRCL of the death of Jeffry Hernandez, AKA Roxsana Hernandez (A206 418 141), a 33-year old transgender woman reported to be a citizen of Honduras.

As part of ICE's death notification process, ICE provided CRCL with a timeline of events leading up to Ms. Hernandez's death. The timeline relays that Ms. Hernandez presented for U.S. admission at the San Ysidro Port of Entry (POE) on May 9, 2018, and claimed fear of return to Honduras. She remained in CBP custody until on May 13, she was transferred into ICE custody at the San Luis Regional Detention Center in Yuma, Arizona. On May 15, she was transferred to the El Paso Service Processing Center in El Paso, Texas and, on May 16, she was finally transferred to the Cibola County Correctional Center in Milan, New Mexico. On May 17, her second day in custody at Cibola, Ms. Hernandez underwent medical screening that was conducted by facility medical staff. Concerned about the detainee's extreme weight loss since her U.S. entry on May 9 (CBP San Ysidro recorded her weight as "160 lbs." and Cibola's Health Services Administrator reported her intake weight as "85 lbs." on May 17), along with low blood pressure, cough and fever (100.8) – and to rule out pneumonia, dehydration and HIV complications – the Cibola medical unit transported her to Cibola General Hospital for further evaluation. There, Ms. Hernandez underwent additional testing for sepsis and hypotension. Cibola General Hospital subsequently transferred Ms. Hernandez by air ambulance to Lovelace Medical Center in Albuquerque, New Mexico where she remained until her May 25, 2018 death.

Also in compliance with ICE's death notification obligations to CRCL, ICE submitted several records created by CBP that discussed Ms. Hernandez's health issues, including a printout of the electronic SIGMA Event, dated May 11, 2018 – two days after she requested entry at the POE. On the top of the form is a hand-written note, "HIV Positive, No meds/fever/chills." CRCL also received a MISSION Medical Support report for the same date titled, "New Patient Comprehensive Exam," which was stamped with the name (b)(6);(b)(7)(c) M.D. All information entered on that form is also hand-written, rendering some of it unreadable. The legible notes indicate that Ms. Hernandez reported weight loss, recurring vomiting, persistent coughing with green mucus, and HIV when she was in CBP custody. The report's medications section contains a hand-written "No," and a checked-box next to "Not medically cleared for transport and incarceration." Conversely, another document created by (b)(6);(b)(7)(c) on the same date clears Ms. Hernandez for transport and detention. A Scripps record produced on the same date titled "Physicians Aftercare Instructions," states, "No clinical evidence of TB, Normal Chest X-ray, +Bronchitis" and instructs that "Home Care" should include "Tylenol for fever," "ZPAK (antibiotic)," and "Albuterol inhaler."

On May 13, Ms. Hernandez was transferred from CBP custody in California to ICE custody in an Arizona detention facility, and then ICE transferred her to two additional detention facilities in Texas and New Mexico.

The records that CRCL received include two documents created on the same date by the same CBP-utilized physician that contain contradictory travel clearances for Ms. Hernandez. In addition, although the same physician assessed her as ill and *in need of antibiotics and an inhaler* on May 11, 2018, there is no indication that she received them during the following days that she remained in CBP custody. Finally, it is unknown whether the medical concerns recorded by CBP traveled with Ms. Hernandez to ICE's Arizona, Texas, and New Mexico detention facilities, which should have alerted those receiving facilities of her medical illnesses and needs. The records that CRCL received from ICE are from the Cibola facility, covering the two days that Ms. Hernandez spent in detention there before her hospitalization and death. CRCL did not receive any of Ms. Hernandez's records from the Arizona or Texas ICE facilities, and therefore it is unknown whether or not she received any care or medication during her transport to those facilities or while she was in custody at each one. The record raises the possibility that the multiple day delays by both CBP and ICE in providing Ms. Hernandez with appropriate medical care and medications may have caused her health conditions to worsen beyond the two hospitals' capacity to save her life.