



June 20, 2018

VIA ELECTRONIC MAIL & ONLINE PORTAL

Sabrina Burroughs
FOIA Officer
U. S. Customs & Border Protection
1300 Pennsylvania Avenue NW, Room 3.3D
Washington, DC 20229
Online Request at FOIAonline

Catrina Pavlik-Keenan
Freedom of Information Act Office
U.S. Immigration & Customs Enforcement
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
ice-foia@dhs.gov

Re: Freedom of Information Act Request

Dear FOIA 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.

Requested Records

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

1. Any guidance or memoranda about Attorney General Sessions's immigration enforcement memoranda in April 2017 (attached as Exhibit A) and April 2018 (attached as Exhibit B) that were sent to (a) ICE, CBP, or Border Patrol leadership; (b) supervisors of field officers; (c) the National ICE Council; or (d) the National Border Patrol Council
2. Any email chains to which any guidance or memoranda responsive to Item 1 are attached.

For ICE, the search may be limited to the following custodians:

- i. Director of the San Diego Field Office;
- ii. Director of the Phoenix Field Office;
- iii. Director of the El Paso Field Office; and
- iv. Director of the San Antonio Field Office.

For CBP, the search may be limited to the following custodians:

- i. Pete Flores, Director of Field Operations, San Diego;
- ii. Director of Field Operations, Houston;
- iii. Director of Field Operations, Laredo;
- iv. Director of Field Operations, El Paso;
- v. Director of Field Operations, Tucson;



- vi. Robert L. Boatright, Chief Patrol Agent, Big Bend Sector, USBP;
- vii. Rush Carter, Border Community Liaison, Big Bend Sector, USBP;
- viii. Felix Chavez, Chief Patrol Agent, Del Rio Sector, USBP;
- ix. David Vera, Border Community Liaison, Del Rio Sector, USBP;
- x. Gloria I. Chavez, Chief Patrol Agent, El Centro Sector, USBP;
- xi. Rodney S. Scott, Chief Patrol Agent (Fmr.), El Centro Sector, USBP;
- xii. Joyce Golosino, Border Community Liaison, El Centro Sector, USBP;
- xiii. Aaron A. Hull, Chief Patrol Agent, El Paso Sector, USBP;
- xiv. Jose Romero, Border Community Liaison, El Paso Sector, USBP;
- xv. Mario Martinez, Chief Patrol Agent, Laredo Sector, USBP;
- xvi. Peter Ayala, Border Community Liaison, Laredo Sector, USBP;
- xvii. Manuel Padilla, Jr., Chief Patrol Agent, Rio Grande Valley Sector, USBP;
- xviii. Charles L. Miller, Border Community Liaison, Rio Grande Valley Sector, USBP;
- xix. Rodney S. Scott, Chief Patrol Agent, San Diego Sector, USBP;
- xx. Richard A. Barlow, Chief Patrol Agent (Fmr.), San Diego Sector, USBP;
- xxi. Michael J. Scappechio, Border Community Liaison, San Diego Sector, USBP;
- xxii. Michael Harris, Border Community Liaison (Fmr.), San Diego Sector, USBP;
- xxiii. Rodolfo Karisch, Chief Patrol Agent, Tucson Sector, USBP;
- xxiv. Steve Passement, Border Community Liaison, Tucson Sector, USBP;
- xxv. Anthony J. Porvaznik, Chief Patrol Agent, Yuma Sector, USBP; and
- xxvi. Mark W. Edwards, Border Community Liaison, Yuma Sector, USBP.

Please provide all responsive records from March 11, 2017, through the date the search is conducted.

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 DHS 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 is subject to the

Federal Records Act and FOIA.¹ 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.²

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 DHS’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.**³ Furthermore, agencies that have adopted the National Archives and Records Agency (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 DHS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DHS 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.”⁴ 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

¹ 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).

² 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)).

³ 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>.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.”⁵ 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.”⁶ 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.’”⁷

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.⁸ 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, DHS 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 DHS 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

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁷ *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)).

⁸ *Mead Data Central*, 566 F.2d at 261.

significant way.⁹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁰

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.”¹¹ There has been extensive media coverage of and public attention on the administration’s new policy of separating immigrant parents and children when they cross at the border.¹² This request goes directly to this action by the federal government. Moreover, the requested records will significantly increase the general public’s understanding of the origins of the policy, the guidance the administration is disseminating to implement the policy, the infrastructure in place to tend to these children, and what outside stakeholders are influencing the decision.

This request is primarily and fundamentally for non-commercial purposes.¹³ 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.¹⁴ 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 website¹⁵ and

⁹ 6 C.F.R. § 5.11(k)(1)(i).

¹⁰ 6 C.F.R. § 5.11(k)(1)(ii).

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

¹² *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>.

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

¹⁴ American Oversight currently has approximately 11,900 page likes on Facebook, and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 15, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 15, 2018).

¹⁵ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁶ Additionally, this particular FOIA request is part of a public project conducted by American Oversight 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.¹⁷

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 DHS 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 Cerissa Cafasso at foia@americanoversight.org or 202.869.5244. 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, reading "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

¹⁶ *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>.

¹⁷ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Exhibit A



Office of the Attorney General
Washington, D. C. 20530

April 11, 2017

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM:

THE ATTORNEY GENERAL

A handwritten signature in black ink, which appears to read "Jeffery B. Sessions", is written over the text "THE ATTORNEY GENERAL".

SUBJECT:

Renewed Commitment to Criminal Immigration Enforcement

Charging Practices

It is a high priority of the Department of Justice to establish lawfulness in our immigration system. While dramatic progress has been made at the border in recent months, much remains to be done. It is critical that our work focus on criminal cases that will further reduce illegality. Consistent and vigorous enforcement of key laws will disrupt organizations and deter unlawful conduct. I ask that you increase your efforts in this area making the following immigration offenses higher priorities. Further guidance and support of executing this priority—including an updated memorandum on charging for all criminal cases—will be forthcoming.

8 U.S.C. § 1324 (“[b]ringing in and harboring certain aliens”) and related offenses: Each District shall consider for prosecution any case involving the unlawful transportation or harboring of aliens, or any other conduct proscribed pursuant to 8 U.S.C. § 1324. If a determination must be made regarding use of finite resources, a priority should be given to those who are bringing in three or more aliens into the United States and those who are transporting or harboring three or more aliens, as well as offenses where there are aggravating circumstances, such as those involving serious bodily injury, physical or sexual assault, or the death of any person. Priority should also be given to prosecuting any offenses under section 1327 (“aiding or assisting criminal aliens to enter”) and section 1328 (“importation of aliens for immoral purposes”).

8 U.S.C. § 1325 (“[i]mproper entry by alien”): Each District shall consider for felony prosecution under 8 U.S.C. § 1325 any case where a defendant has two or more prior misdemeanor improper entry convictions or one or more prior misdemeanor improper entry convictions with aggravating circumstances, such as a felony criminal history, gang membership or affiliation, multiple prior voluntary returns, prior removal, deportation or exclusion, or other aggravating circumstances. Each District shall also consider for felony prosecution under 8 U.S.C. § 1325 any case where a defendant knowingly enters into a marriage for the purpose of evading any provision of the immigration laws.

Regarding misdemeanor violations of 8 U.S.C. § 1325, I ask that each U.S. Attorney’s Office on the Southwest Border (i.e., District of Arizona, District of New Mexico, Southern

District of California, Southern District of Texas, and Western District of Texas) work with the U.S. Department of Homeland Security and any other appropriate agency to develop a set of guidelines for prosecuting such violations. These guidelines should aim to accomplish the goal of deterring first-time improper entrants. Each District should submit its guidelines to the Office of the Deputy Attorney General by April 24, 2017.

8 U.S.C. § 1326 (“[r]eentry of removed aliens”): Each District shall consider prosecution of 8 U.S.C. § 1326 for each illegal reentrant. Priority, however, must be given to defendants who have been convicted of an aggravated felony, have any prior criminal history indicating the defendant poses a danger to public safety, have one or more administrative or criminal immigration violations, gang membership or affiliation, or where other aggravating circumstances are present.

18 U.S.C. § 1028A (“[a]ggravated identity theft”) & 18 U.S.C. § 1546 (“[f]raud and misuse of visas, permits, and other documents”): Each District shall consider, to the extent practicable, prosecution of both aggravated identity theft under Section 1028A and document fraud under Section 1546 in relation to the immigration offenses listed above.

18 U.S.C. § 111 (“[a]ssaulting, resisting, or impeding” officers): Each District shall consider, to the extent practicable, prosecution of assault, resisting, or impeding officers under Section 111, while they are engaging in the performance of their official duties in the administrative and criminal immigration context. More information on this will follow.

Sentencing Practices

At the sentencing phase of each federal case, prosecutors should seek, to the extent practicable, judicial orders of removal and a term of supervised release that is consistent with the factors set forth in 18 U.S.C. § 3553(a). I know many of you are already seeking these measures from District Courts, and I ask that you continue this effort to achieve the results consistent with this guidance.

Border Security Coordinators

In furtherance of these objectives, I also direct every District to designate a Border Security Coordinator (“Coordinator”) by close of business on April 18, 2017. These Coordinators will be responsible for:

- overseeing the investigation and prosecution of the offenses listed above;
- attending training programs with other Coordinators regarding these offenses;
- providing legal advice and training to AUSAs regarding these offenses; and
- maintaining and routinely reporting prosecution statistics related to these offenses.

Each Coordinator will be responsible for convening meetings with representatives from the Department of Homeland Security—including Immigration and Customs Enforcement, Homeland Security Investigations, U.S. Customs and Border Protection, and United States

Citizenship and Immigration Services as well as other law enforcement partners deemed necessary to accomplish this criminal immigration enforcement effort. The Coordinator will work with this group to (1) coordinate specific immigration enforcement initiatives, emphasizing those initiatives that will have the greatest impact on public safety; (2) initiate training programs; and (3) facilitate information sharing.

Exhibit B



Office of the Attorney General
Washington, D. C. 20530

APRIL 6, 2018

MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER

FROM:

THE ATTORNEY GENERAL

A handwritten signature in black ink, appearing to be "A. Gonzales", is written over the text "THE ATTORNEY GENERAL". To the right of the signature, the date "4/6/18" is handwritten.

SUBJECT:

Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)

On April 11, 2017, I issued a memorandum to all federal prosecutors entitled “Renewed Commitment to Criminal Immigration Enforcement,” in which I directed the prioritization of the prosecution of certain criminal immigration offenses. I further directed each United States Attorney’s Office along the Southwest Border to work with the Department of Homeland Security to develop guidelines for prosecuting offenses under 8 U.S.C. § 1325(a).

Those seeking to further an illegal goal constantly alter their tactics to take advantage of weak points. That means we must effectively respond with smart changes also. The recent increase in aliens illegally crossing our Southwest Border requires an updated approach. Past prosecution initiatives in certain districts—such as Operation Streamline—led to a decrease in illegal activities in those districts. We must continue to execute effective policies to meet new challenges.

Accordingly, I direct each United States Attorney’s Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a). This zero-tolerance policy shall supersede any existing policies. If adopting such a policy requires additional resources, each office shall identify and request such additional resources.

You are on the front lines of this battle. I respect you and your team. Your dedication and insight into border reality is invaluable. Keep us informed, and don’t hesitate to give us suggestions for improvement. Remember, our goal is not simply more cases. It is to end the illegality in our immigration system.

This guidance is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.