



October 18, 2018

VIA ELECTRONIC MAIL

Freedom of Information Officer
Department of Health & Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@hhs.gov

Freedom of Information Officer
Administration for Children & Families
U.S. Department of Health and Human Services
330 C Street SW
Washington, DC 20201
FOIA@acf.hhs.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 for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, American Oversight makes the following request for records.

In July 2018, Health and Human Services Secretary Alex Azar announced that his agency would be using DNA tests in an effort to comply with a court order to reunite nearly 3,000 children separated from their parents as a result of the Justice Department's "zero tolerance" policy on immigration and previous actions.¹ This announcement prompted concerns about HHS's plans to obtain consent for the DNA testing, as well as its plans for the storage and sharing of the information gained from the tests, none of which HHS has related to news organizations.² American Oversight seeks records that shed light on the implementation of this DNA testing and the disposition of the data collected during the process.

¹ See Julia Ainsley, *U.S. Has Nearly 3,000 Separated Migrant Kids, Will Use DNA to Find Parents*, NBC NEWS, July 5, 2018, <https://www.nbcnews.com/politics/immigration/u-s-has-nearly-3-000-separated-migrant-kids-will-n888986>.

² See Sonia Moghe *et al.*, *DNA Tests Are in the Works for Separated Migrant Children and Parents*, CNN, July 5, 2018, <https://www.cnn.com/2018/07/05/politics/dna-testing-migrant-family-separation/index.html>.



Requested Records

American Oversight requests that HHS and ACF produce the following within twenty business days:

1. Records sufficient to identify any procedures, standards, guidance, policies, and rules with regard to conducting DNA tests of children and parents separated from each other by immigration authorities, including the storage or disposal of data gathered from that testing. This search should include:
 - a. Any final legal guidance or analyses produced by HHS and/or ACF regarding the decision to use DNA testing to reunite separated migrant families;
 - b. Records sufficient to show the office and program within HHS and/or ACF responsible for conducting DNA testing of separated migrant families;
 - c. Records reflecting any auditing and compliance mechanisms HHS and/or ACF have in place to ensure that the testing is in accordance with applicable laws and policies;
 - d. Records reflecting all guidance or standards for obtaining consent for DNA testing from migrant children in the care of HHS/ACF or adult family members; and
 - e. Records reflecting all plans for storage or destruction of genetic material & data obtained through DNA testing of separated families.
2. Records sufficient to show the names of the laboratory or laboratories HHS and/or ACF are working with to conduct the DNA testing, including contracts for the DNA testing of separated migrant families.
3. Records sufficient to show the types of genetic markers (e.g., STRs or SNPs) that these laboratories tested for and whether the laboratories used the CODIS STR panel to generate DNA fingerprints.
4. Records sufficient to show the cost of DNA testing of separated migrant families, and the source of the funds used for this testing, including any reassignment of funds to cover the cost of the testing.
5. All records reflecting any agreement to share information from DNA testing of separated migrant families with any entity outside of HHS, including the Federal Bureau of Investigation, any other part of the Department of Justice, any entity within the Department of Homeland Security, or the Department of State, including any memorandum of understanding with any other federal agency regarding the sharing of this information.
6. Records reflecting any procedure to reunite family members who cannot support their claims of relationship with DNA tests.

7. All documents produced in response to the July 13, 2018 letter from Reps. Jackie Speier and Karen Bass to Secretary Azar regarding transparency in HHS's use of DNA testing to reunite separated families.³

Please provide all responsive records from May 1, 2018 to the date of 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 HHS 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.⁴ **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.**⁵

³ Rep. Jackie Speier and Rep. Karen Bass, Letter to Health and Human Services Secretary Alex Azar (July 13, 2018), <https://bass.house.gov/media-center/press-releases/members-congress-demand-transparency-hhs-use-dna-testing-reunite>.

⁴ 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).

⁵ 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 HHS’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.**⁶ 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 HHS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that HHS 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.”⁷ 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.”⁸ 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.”⁹ 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.’”¹⁰

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

⁶ 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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹⁰ *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)).

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.¹¹ 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, HHS 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 HHS 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 45 C.F.R. § 5.54, 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 government operations by the general public in a significant way.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

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.”¹⁴ There has been extensive media coverage of and public attention on the administration’s DNA testing of migrant families.¹⁵ Advocacy groups have

¹¹ *Mead Data Central*, 566 F.2d at 261.

¹² 45 C.F.R. § 5.54(a).

¹³ *Id.*

¹⁴ 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

¹⁵ See Elizabeth Weise *et al.*, *DNA Tests Used to Reunite Migrant Families Spark Worries They’ll Be Used for Much More*, USA TODAY (July 9, 2018, 11:59 A.M.), <https://www.usatoday.com/story/tech/2018/07/09/how-dna-testing-work-reunited-families-separated->

raised concerns about how and why the government is collecting DNA information, as well as the costs associated with DNA collection.¹⁶ 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 efforts to reunite families separated at the border.

This request is primarily and fundamentally for non-commercial purposes.¹⁷ 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.¹⁸ 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,¹⁹ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁰ 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.²¹

<border/761810002/>; Alice Ollstein, *ACLU Accuses Trump Admin of Using DNA Tests to Slow-Walk Family Reunifications*, TALKING POINTS MEMO (July 10, 2018, 12:35 P.M.), <https://talkingpointsmemo.com/dc/aclu-accuses-trump-admin-of-using-dna-tests-to-slow-walk-family-reunifications>; *HHS Confirms DNA Testing of Migrant Families with Additional Details*, GENOMEWEB, July 9, 2018, <https://www.genomeweb.com/policy-legislation/hhs-confirms-dna-testing-migrant-families-additional-details#.W8iLOBNKjUJ>.

¹⁶ *Id.*; Paul Blest, *The Government Is Reportedly Trying to Make Migrant Women Pay for DNA Testing*, SPLINTER NEWS (July 10, 2018, 10:16 P.M.), <https://splinternews.com/the-government-is-reportedly-trying-to-make-migrant-wom-1827498360>.

¹⁷ 45 C.F.R. § 5.54(b)(3)(i)-(ii).

¹⁸ American Oversight currently has approximately 11,900 page likes on Facebook, and 45,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 18, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 18, 2018).

¹⁹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁰ *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>.

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 HHS 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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight