



April 18, 2019

VIA ONLINE PORTAL & ELECTRONIC MAIL

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Via FOIAOnline

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U.S. Immigration and Customs Enforcement
500 12th Street SW
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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.

The deaths of individuals held in DHS-component custody have become an issue of significant public concern. On February 22, 2019, while in DHS-component custody, a pregnant detainee prematurely went into labor and delivered a stillborn baby.¹ This death follows reporting that pregnant women in DHS-component custody are not receiving adequate medical care, and, in some instances, have been shackled around their stomachs and denied access to important medications.²

A number of high-profile juvenile deaths have also occurred in DHS-component custody. In December 2018, 7-year-old Jakelin Caal Maquin reportedly died of “sepsis shock,” and weeks later, an 8-year-old died from an illness.³

¹ Daniella Silva, *Honduran Woman in Immigration Custody Gives Birth to Premature, Stillborn Baby*, NBC NEWS (Feb. 25, 2019, 5:49 PM), <https://www.nbcnews.com/news/latino/honduran-woman-immigration-custody-gives-birth-premature-stillborn-baby-n975856>.

² Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018, 2:44 PM), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-icedetention-trump>.

³ Amanda Covarrubias, *Guatemalan Girl Likely Died of 'Sepsis Shock' after Crossing Border, Hospital Officials said*, NBC NEWS (Dec. 17, 2018, 3:26 AM), <https://www.nbcnews.com/news/us-news/guatemalan-girl-died-sepsis-shock-hospital-officials-said-n948666>; Alejandro de la Garza, *8-Year-Old Boy Who Died in Border Patrol Custody Had the Flu, Authorities Confirm*, TIME, Dec. 28, 2018, <http://time.com/5489884/8-year-old-boy-died-border-custody-flu/>.



These deaths raise questions about both the quality and scope of the medical care provided to pregnant and juvenile detainees. It is in the public interest to understand the policies and training procedures currently in place for these groups of at-risk detainees. Through the disclosure of this information, the public will gain insight into the care for vulnerable groups during their detention in DHS-component custody.

American Oversight seeks records with the potential to shed light on DHS's treatment of at-risk detainees (and the treatment provided by DHS's component agencies), including the actions DHS officials have taken to address serious threats to the lives of those detained.

Requested Records

American Oversight requests that Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) produce the following within twenty business days:

1. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of, medical evaluation and care for, and safety measures to be taken for pregnant detainees.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of pregnant detainees, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

2. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for pregnant detainees.
3. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of, medical evaluation and care for, and safety measures to be taken for juvenile detainees.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of juvenile detainees, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

4. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for juvenile detainees.
5. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of, medical

evaluation and care for, and safety measures to be taken for detainees who have miscarried.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of detainees who have miscarried, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

6. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for detainees who have miscarried.
7. All email communications (including emails, email attachments, and calendar invitations) of (1) Matthew Albence, now- Acting Director of ICE, and anyone who has served as his chief of staff, (2) former Acting ICE Director Thomas Homan and anyone who served as his chief of staff, (3) former ICE Acting Director Ronald D. Vitello and anyone who served as his chief of staff, and (4) former CBP Commissioner Kevin McAleenan and anyone who served as his chief of staff, containing any of the following key terms:
 - a. Stillborn
 - b. Stillbirth
 - c. "Still born"
 - d. Restrain *
 - e. Shackl*
 - f. "Pregnancy failure"
 - g. "Unsuccessful pregnancy"
 - h. "Premature labor"
 - i. "Pre-mature labor"
 - j. "Unresponsive infant"
 - k. "nonresponsive infant"
 - l. "High-risk pregnancy"
 - m. "High risk pregnancy"
 - n. "Post-partum treatment"
 - o. "Postpartum treatment"
 - p. "Pregn* complicat*"

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

Please note that American Oversight is using the asterisk (*) to designate the standard use of "wildcards" in the search for responsive records. For example, a search for "separat*" would return all of the following: separate, separates, separated, separation, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Please exclude news clips generated from non-governmental services and emails distributed to a wide listserv of twenty or more email addresses. A news clips email that is forwarded by an individual to one of the identified individuals with any additional message *should* be considered responsive.

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.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

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**

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

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 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.”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

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.

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)).

¹¹ *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.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 This request relates directly to the work of DHS components CBP and ICE, including some of the most important responsibilities of DHS, the safety and care of the individuals it has detained and deprived of liberty. This request seeks records that would shed light on how DHS components are treating those detained, and how the components ensure that some of its most vulnerable detainees—pregnant women, children, and infants—receive adequate treatment and care. These are matters of significant public and congressional concern,¹⁵ and the requested records will provide the public with information necessary to hold DHS components accountable for its actions and policies. 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.

This request is primarily and fundamentally for non-commercial purposes.¹⁶ 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

¹² 6 C.F.R. § 5.11(k)(1)(i).

¹³ 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁵ *See Silva, supra* note 1; O’Connor & Prakash, *supra* note 2.

¹⁶ 6 C.F.R. § 5.11(k)(1)(ii), (3)(i)–(ii).

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.¹⁷ 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 website¹⁸ and published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁹ 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.²⁰

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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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,



Austin R. Evers
Executive Director
American Oversight

¹⁷ 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 Apr. 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 16, 2019).

¹⁸ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁹ *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>.

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.