



April 18, 2019

VIA ELECTRONIC MAIL

FOIA Office
U.S. Immigration and Customs Enforcement
500 12th Street SW
Stop 5009
Washington, DC 20536-5009
ice-foia@dhs.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act 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.

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,”³ and weeks later, an 8-year-old died from an illness.⁴

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>.

⁴ 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/>.



In the summer of 2016, DHS's Office of the Inspector General issued a report in which it noted that Immigration and Customs Enforcement (ICE) continued to struggle to employ an appropriate level of mental-health focused staff.⁵ This report predated a wave of suicides in DHS-component custody, including the death of Mergensana Amar, a Russian national who participated in a hunger strike before committing suicide.⁶

These deaths raise questions about both the quality and scope of the medical care provided to those in ICE custody. It is in the public interest to understand the current staffing levels of the Immigration and Customs Enforcement Health Service Corps (IHSC) as these individuals are tasked with the responsibility of caring for at-risk detainees. Through the disclosure of this information, the public will gain insight into the care for vulnerable groups during their detention in ICE custody.

Requested Records

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

1. Records sufficient to show current staffing levels at IHSC, including but not limited to:
 - The number of people hired in fiscal years ("FYs") 2015-2016, 2016-2017, 2017-2018, and 2018-2019.
 - The number of people who have been terminated from or vacated their staff positions in IHSC for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.
 - Total full-time equivalents (FTE) for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.
 - The number of people employed with IHSC in a mental-health-services-capacity in FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.
2. Records sufficient to demonstrate the extent of IHSC recruitment efforts, including but not limited to:
 - All final IHSC policies and directives regarding recruitment outreach efforts.
 - All final IHSC policies and directives regarding the recruitment of IHSC personnel.

⁵ OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SECURITY, OIG-16-113-VR, ICE STILL STRUGGLES TO HIRE AND RETAIN STAFF FOR MENTAL HEALTH CASES IN IMMIGRATION DETENTION, July 2016, <https://www.oig.dhs.gov/assets/VR/FY16/OIG-16-113-VR-Jul16.pdf>.

⁶ Maria Sachetti, *ICE Detainee Hanged Himself After Being Taken off Suicide Watch*, WASH. POST, Nov. 29, 2018, https://www.washingtonpost.com/local/immigration/ice-detainee-hanged-himself-after-being-taken-off-suicide-watch/2018/11/28/67a62e74-edb8-11e8-baac-2a674e91502b_story.html?utm_term=.cabefc2a88d6.

- Current or past recruitment incentives, along with the monetary value(s) assigned thereto.

American Oversight does not object to redaction from such records of any names or identifying information of agency personnel.

Please provide all responsive records for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019. Please bear in mind that responsive documents related to FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019 might be dated outside of those fiscal years.

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 are subject to the Federal Records Act and FOIA.⁷ **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.**⁸

⁷ 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).

⁸ 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 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.**⁹ 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 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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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

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

⁹ 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>.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹³ *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)).

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.¹⁴ 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, we 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, 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.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

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.”¹⁷ This request relates directly to the work of ICE and some of the most important responsibilities of DHS, including government activities that affect the safety and care of the individuals DHS has detained and deprived of liberty. This request seeks records that would shed light on how a DHS component is ensuring or failing to ensure appropriate staffing levels for treating those who are detained, and whether the agency has allocated sufficient resources to respond when the life and safety of detainees is threatened. These are matters of significant public and congressional concern,¹⁸ and the requested records will provide the public with information necessary to hold a DHS component accountable for its

¹⁴ *Mead Data Central*, 566 F.2d at 261.

¹⁵ 6 C.F.R. § 5.11(k)(1)(i).

¹⁶ 6 C.F.R. § 5.11(k)(1)(ii).

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

¹⁸ *See Silva*, *supra* note 1; O’Connor & Prakash, *supra* note 2.

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.¹⁹ 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.²⁰ 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 website²¹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²² 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.²³

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

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

²⁰ American Oversight currently has approximately 12,100 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).

²¹ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Dan McGrath at foia@americanoversight.org or (202) 897-4213. Also, if the 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". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight