



June 24, 2019

VIA 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

Re: Freedom of Information Act Request

Dear Ms. Burroughs:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

News media have reported that U.S. Border Patrol (USBP) has opened two "soft-sided facilities," or tent cities, to house migrants at the southern border, one in El Paso and one in Donna, Texas.¹ When a congressional delegation visited the facility in El Paso in April, Rep. Nanette Barragán of California reported that "[t]he situation is unhealthy. People are in a confined space, they're not getting showers, their clothes are dirty, babies are not getting Pampers like they should be." Rep. Barragán said she was prohibited from taking photos of migrants in the facility.²

¹ See Annie Rose Ramos & Gabe Gutierrez, *Two New Tent Cities Open in Texas to Handle Influx of Migrant Families*, NBC NEWS, May 4, 2019, <https://www.nbcnews.com/news/us-news/two-new-tent-cities-open-texas-handle-influx-migrant-families-n1001676>; Justin Rohrlich, *The US Is Spending \$37 Million on Two New Tent Cities for Detained Immigrant Children and Families*, QUARTZ, Apr. 14, 2019, <https://qz.com/1595091/cbp-spending-37-million-on-new-immigrant-tent-city/>; Julián Aguilar, *Temporary Immigration Detention Facilities to Open in El Paso, Rio Grande Valley*, TEXAS TRIBUNE, Apr. 18, 2019, <https://www.texastribune.org/2019/04/18/texas-host-new-tent-city-migrant-families/>.

² Justin Glawe & Justin Hamel, *Border Patrol Holds Hundreds of Migrants in Growing Tent City Away From Prying Eyes*, DAILY BEAST, Apr. 15, 2019, <https://www.thedailybeast.com/border-patrol-holds-migrants-in-el-paso-tent-city-away-from-prying-eyes>.



This request seeks to shed light on the conditions within the El Paso and Donna facilities as the Trump administration reportedly seeks to expand its migrant detention capabilities.³

Requested Records

American Oversight requests that U.S. Customs and Border Protection (CBP) produce within twenty business days:

1. All photographs, videos, or audio recordings taken at USBP's temporary processing center in El Paso, Texas, by any United States Border Patrol (USBP) employee supervising or stationed at the El Paso facility between April 1, 2019, and the date of your search.

CBP is best able to identify the custodians most likely to be in possession of responsive records, but we request that CBP search paper files, electronic files, and mobile devices of, at a minimum:

- a. El Paso Sector Chief Patrol Agent Aaron A. Hull
 - b. El Paso Sector Deputy Chief Patrol Agent Chris Clem
 - c. All employees stationed at USBP's temporary processing center in El Paso, Texas, between April 1, 2019, and June 24, 2019.
2. Records sufficient to show the capacity of USBP's temporary processing center in El Paso, Texas, and the number and ages of individuals housed in the facility each week since April 1, 2019.
 3. All photographs, videos, or audio recordings taken at USBP's temporary processing center in Donna, Texas, by any United States Border Patrol (USBP) employee supervising or stationed at the Donna facility between April 1, 2019, and the date of your search.

CBP is best able to identify the custodians most likely to be in possession of responsive records, but we request that CBP search paper files, electronic files, and mobile devices of, at a minimum:

- a. Rio Grande Valley Sector Chief Patrol Agent Manuel Padilla, Jr.
 - b. Rio Grande Valley Deputy Chief Patrol Agent Raul L. Ortiz.
 - c. All employees stationed at USBP's temporary processing center in Donna, Texas, between April 1, 2019, and June 24, 2019.
4. Records sufficient to show the capacity of USBP's temporary processing center in Donna, Texas, and the number and ages of individuals housed in the facility each week since April 1, 2019.

³ See Emily Green, *Get Ready for More Tent Cities at the Border*, VICE, Apr. 26, 2019, https://news.vice.com/en_us/article/qv787q/tent-cities-at-the-border-are-the-white-houses-solution-for-denying-bail-to-migrants.

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, you are 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 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 There has been extensive media coverage of and public attention on the administration’s plans to use tent cities to house migrant families near the southern border.¹⁵ The public has a great interest in knowing how immigrants to the United States

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), (2)(i)-(iv).

¹⁵ See Mitchell Ferman, *The Border Patrol’s 2 New Tent Camps Cost \$37 Million. Take a Look Inside.*, N.Y. TIMES, May 3, 2019, <https://www.nytimes.com/2019/05/03/us/border-tent-camp-texas.html>; Nomaan Merchant & Cedar Attanasio, *US Wants to Build More Tents at Border to Detain Migrants*, AP, Apr. 16, 2019, <https://www.apnews.com/c63609bbcc3d43a899a0a53344946e43>; Ted Hesson et al., *Trump White House Plots Amped-up Immigration Crackdown*, POLITICO, Apr. 8, 2019, <https://www.politico.com/story/2019/04/08/trump-immigration-agency-head-1332660>.

are being treated as they enter the country, and this request goes directly to those actions by the federal government. Moreover, disclosure of the requested information will contribute to public understanding; as discussed below, American Oversight has the ability and intention to effectively convey the information it receives to the public.

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 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.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 CBP 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

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

¹⁷ American Oversight currently has approximately 12,600 followers on Facebook, and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 24, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 24, 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>.

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