AMERICAN OVERSIGHT

August 21, 2019

VIA EMAIL AND FOIA ONLINE

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009
ICE-FOIA@dhs.gov

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

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 your agencies, 6 C.F.R. Part 5, American Oversight makes the following request for records.

In July 2019, CNN reported on a March 5, 2019, incident at ICE's El Paso Processing Center in which CBP agents "allegedly attempted to humiliate a Honduran migrant my making him hold a sign that read, 'I like men,' according to emails written by an agent who witnessed the incident."[1] The alleged incident came to light shortly after ProPublica revealed the existence of a Facebook group in which Border Patrol agents made offensive comments about migrants, putting the culture of the agency under public scrutiny.[2]

[1] Nick Valencia et al., *Border Patrol Agents Allegedly Tried to Shame a Migrant by Making Him Hold a Sign Reading 'I Like Men,' Emails Show*, CNN (July 4, 2019, 4:58 PM), https://www.cnn.com/2019/07/04/us/honduran-migrant-shamed-border-patrol/index.html.

[2] A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019, 10:55 AM), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes.

American Oversight seeks photographs that may shed light on the alleged incident and on the culture among CBP and ICE personnel stationed at the El Paso Processing Center.

Requested Records

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

> All photographs, videos, or audio recordings taken between February 26, 2019, and March 12, 2019, and stored on the government-owned mobile devices of any ICE employee working at ICE's El Paso Processing Center during that date range.
>
> American Oversight requests that all photographs, video, or audio recordings be produced in their native format with original metadata preserved to the extent possible.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 operations or activities of the government."[3] The public has a significant interest in the conditions in which the Department of Homeland Security is holding migrants at the southern border of the U.S.[4] and in the culture of the agencies

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[3] 5 U.S.C. § 552(a)(4)(A)(iii).

[4] *See* Elliot C. McLaughlin, *'Close the Camps': Protesters Across the Country Demand an End to Migrant Detention Centers*, CNN (July 2, 2019, 12:04 PM), https://www.cnn.com/2019/07/02/us/detention-facilities-protests-migrants-close-camps/; Elliott C. McLaughlin & Artemis Moshtaghian, *Federal Judge: Let Doctors into Child Migrant Detention Centers, Quickly*, CNN, June 30, 2019, https://www.cnn.com/2019/06/30/us/child-migrant-detention-center-doctors-federal-judge/index.html; *Acting CBP Chief to Resign amid Scrutiny over Treatment of Migrant Children*, CBS NEWS (Jun. 25, 2019, 4:13 PM), https://www.cbsnews.com/news/john-sanders-acting-customs-and-border-protection-commissioner-to-resign-amid-scrutiny-over-detention-centers/.

tasked with detaining migrants.[5] Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the conditions under which migrant detainees are being kept. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.[6] 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.[7]

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.[8] Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;[9] posting records received as part of American Oversight's "Audit the Wall" project

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[5] *See* Josh Parkinson and Quinn Owen, *CBP launches investigation into private Facebook group mocking lawmakers as they blast immigrant treatment*, ABC NEWS (July 1, 2019, 5:10 PM), https://abcnews.go.com/Politics/cbp-launches-investigation-private-facebook-group-mocking-immigrants/; Fernanda Echavarri, *Border Patrol's Toxic Culture Goes Way Beyond Facebook Groups. It's Actually for Sale on a T-Shirt.*, MOTHER JONES, July 19, 2019, https://www.motherjones.com/politics/2019/07/border-patrol-racist-texts-bowen-t-shirt/; Dara Lind, *Border Patrol Agents Are Passing Around A Commemorative Coin Mocking Care for Migrant Kids*, ProPublica (July 12, 9:45 AM), https://www.propublica.org/article/border-patrol-agents-are-passing-around-a-commemorative-coin-mocking-care-for-migrant-kids

[6] *See* 5 U.S.C. § 552(a)(4)(A)(iii).

[7] American Oversight currently has approximately 12,200 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited May 29, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited May 29, 2019).

[8] *News*, AMERICAN OVERSIGHT, https://www.americanoversight.org/blog.

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

to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;[10] and posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;[11] posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;[12] posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.[13]

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- 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.

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compliance; *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.

[10] *See generally Audit the Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall; *see, e.g.*, *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall.

[11] *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business.

[12] *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia.

[13] *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, https://www.americanoversight.org/sessions-letter.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.[14] 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, by intent or through negligence, failed to meet their obligations.[15]

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,[16] and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the

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[14] *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).
[15] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).
[16] 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.

requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, 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,



Austin R. Evers
Executive Director
American Oversight