



June 25, 2018

*Via U.S.P.S. Certified Mail and Electronic Mail, FOIA Online Portal or Fax*

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Dear FOIA Officers:

The National Immigration Law Center (NILC) (“NILC” or “Requestor”) makes this request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*, for records, regarding the separation of children and their parents or adult guardians, held by the United States Department of Homeland Security (DHS); DHS Office of Civil Rights and Civil Liberties (OCRCL); United States Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); U.S. Customs and Border Protection (CBP); White House Office of Management and Budget (including the Office of Information and Regulatory Affairs) (OMB); United States Department of Justice (DOJ); Office of the Attorney General (OAG);

DOJ Civil Division (CIV); Office of the Solicitor General (OSG); Office of Legal Counsel (DOJ-OLC); the U.S. Department of Health and Human Services (HHS), including the Administration of Children and Families (ACF) and the Office of Refugee Resettlement (ORR); the U.S. Navy (NAVY); and the Office of the Secretary of Defense (DOD).

## **BACKGROUND**

On April 6, 2018, Attorney General Sessions announced a “zero-tolerance policy” that increased the number of individuals prosecuted for criminal entry. As a result of that policy, over 2,300 children were forcibly removed from their parents or adult guardians and placed in detention facilities. Numerous high-ranking administration officials have referred to the purpose of the zero-tolerance policies and family separation policies as deterrence. White House Chief of Staff John Kelly declared that “a big name of the game is deterrence” and that family separation “could be a tough deterrent – would be a tough deterrent.”<sup>1</sup> Before the policy was announced, Mr. Kelly said that he was considering a family separation policy because “in order to deter more movement along this terribly dangerous network, I am considering exactly that. They will be well cared for as we deal with their parents.”<sup>2</sup> On June 20, 2018, President Trump issued an executive order entitled “Affording Congress an Opportunity to Address Family Separation.”

## **RECORDS REQUESTED**

The Requestor seeks DHS, OCRCL, ICE, CBP, USCIS, OMB, DOJ, DOJ-OLC, OAG, CIV, OSG, HHS, ACF, ORR, NAVY, and DOD records<sup>3</sup> related to or referring to (1) the policy and/or practice of separating children from their parents or adult guardians after entry into the United States (hereinafter, “Separation of Families Policy/Practice”) after entry into the United States, (2) the “zero-tolerance policy” for prosecuting attempted illegal entry and illegal entry under 8

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<sup>1</sup> See Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent, WASHINGTON POST, June 19, 2018, [https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?utm\\_term=.58e8e27f41aa](https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?utm_term=.58e8e27f41aa).

<sup>2</sup> *Id.*

<sup>3</sup> The term “records” as used herein includes but is not limited to all records or communications preserved in electronic or written form, including but not limited to correspondence, including but not limited to intra-governmental correspondence, documents, data, videotapes, audio tapes, faxes, files, forms, e-mails, guidance, guidelines, evaluations, legal opinions, instructions, analyses, directives, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, questionnaires, studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or video tapes, or any other sub-regulatory guidance.

U.S.C. § 1325(a) announced by Attorney General Sessions on April 6, 2018<sup>4</sup> (hereinafter, the “Zero-Tolerance Policy”); or (3) the Executive Order entitled “Affording Congress an Opportunity to Address Family Separation” dated June 20, 2018 (hereinafter, the “Executive Order”). The children who have been separated from their parents or adult guardians by the federal government after entry into the United States will be referred to in this document as “Separated Children,” and the parents or adult guardians of those children will be referred to as “Parents/Guardians of Separated Children.” The time frame for this request is January 20, 2017 to the present, unless otherwise indicated.

These records include, but are not limited to:

1. Any records, including but not limited to reports, memoranda, guidance, analyses, policies or procedures, or communications, relating to the development, adoption, implementation, or monitoring of the “Zero-Tolerance Policy,” including but not limited to:
  - a. Any memoranda, guidance, guidelines, instructions, directives, or communications sent to or received from the Attorney General’s office, the Deputy Attorney General’s office, United States Attorneys’ offices, CBP, ICE, or USCIS, including but not limited to CBP, ICE and USCIS field officers, regarding the implementation of the policy;
  - b. Any communications between the Attorney General’s office or the Deputy Attorney General’s office and United States Attorneys’ offices relating to the policy;
  - c. Any communications between the Attorney General’s office, the Deputy Attorney General’s Office or the DOJ Civil Division and the White House relating to the policy;
  - d. Any records related to or referring to any purported deterrent effect of the policy;
  - e. Any records relating to the effect or expected effect of the policy on the number of people in immigration detention;
  - f. Any records relating to or referring to the number of children who have been separated from their parents/adult guardians;

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<sup>4</sup> See Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, Apr. 6, 2018, <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

- g. Any records relating to or referring to any policy and/or practice of identifying and/or tracking children who have been separated from their parents or adult guardians;
- h. Any records relating to or referring to any policy and/or practice of housing and/or detaining children who have been separated from their parents or adult guardians;
- i. Any records relating to or referring to any policy and/or practice concerning the conditions of the housing and/or detention of children who have been separated from their parents or adult guardians;
- j. Any records relating to the effect or expected effect of the policy on the number of people being apprehended at the border;
- k. Any records relating to the effect or expected effect of the policy on the number of people attempting to enter the United States, either at a port of entry or outside a port of entry;
- l. Any records relating to the effect or expected effect of the policy on children and their parents or adult guardians being separated after entry into the United States;
- m. Any records relating to the effect or expected effect of the policy on the health (physical, emotional, mental, or otherwise) of children who are separated from their parents/adult guardians;
- n. Any records relating to the effect or expected effect of the policy on the health (physical, emotional, mental, or otherwise) of parents/or adult guardians who are separated from their children;
- o. Any records relating to the effect or expected effect of the policy on convictions or plea agreements;
- p. Any records relating to the effect or expected effect of the policy on the average length of detention of people in immigration detention;
- q. Any records relating to the legality of the policy;
- r. Any records relating to the number of individuals who have been criminally prosecuted on or after 04/06/2018 under 8 U.S.C. § 1325 or 8 U.S.C. § 1326, including a breakdown of the charge/s and the amount of time each person has spent in immigration detention;
- s. Any records relating to the number of individuals seeking asylum at the border who have been criminally prosecuted as of January 1, 2018;

- t. Any records relating to the effect of the zero-tolerance policy on the treatment of individuals seeking asylum at the border;
  - u. Any records relating to guidance, training, or other materials regarding the implementation of the policy.
2. Any records, including but not limited to reports, memoranda, analyses, or communications, relating to the development, adoption, implementation, or monitoring of the Separation of Families Policy/Practice, including but not limited to:
- a. Any memoranda, guidance, or communications sent to or received from the Attorney General's office, the Deputy Attorney General's office, United States Attorneys' offices, CBP, ICE, or USCIS, including but not limited to CBP, ICE and USCIS field officers, regarding the implementation of the policy/practice;
  - b. Any communications between the Attorney General's office or the Deputy Attorney General's office and United States Attorneys' offices relating to the policy/practice;
  - c. Any communications between the Attorney General's office, the Deputy Attorney General's office or the DOJ Civil Division and the White House relating to the policy/practice;
  - d. Any records related to or referring to any purported deterrent effect of the policy/practice;
  - e. Any records relating to the effect or expected effect of the policy/practice on the number of children in immigration detention;
  - f. Any records relating to the effect or expected effect of the policy/practice on the number of Separated Children;
  - g. Any records relating to the effect or expected effect of the policy on the health (physical, emotional, mental, or otherwise) of children who are housed in immigration detention;
  - h. Any records relating to the number of children who have been separated from their parents or adult guardians;
  - i. Any records relating to the number of parents or adult guardians who have been separated from their children;
  - j. Any records relating to guidance, training, or other materials regarding the implementation of the policy;

- k. Any notes, memoranda, reports, or analyses relating to a February 2, 2017 town hall for USCIS asylum officers;
  - l. Any memoranda relating to efforts to deter immigration to the United States, including but not limited to memoranda drafted in preparation for or resulting from an August 2017 meeting with Gene Hamilton;<sup>5</sup>
  - m. Any records reflecting the results of the “pilot program” conducted in the Rio Grande Valley during 2017 relating to the zero-tolerance prosecutions for illegal entry and separation of children from their parents or adult guardians;
  - n. Any records related to or referring to the legality, lawfulness, or perceived legal infirmities of the separation of families, including the separation of children from adult guardians;
3. A list of all the facilities where Separated Children are presently being held by DHS, HHS, DOD, or other federal entities, including the facility name, location, capacity, and a list of the number of Separated Children held at each facility broken down by age and by nationality. We also request the name, title, and contact information of the individual in charge of each facility, as well as a list of the number of staff expected to be present at each facility.
4. Any records, including but not limited to reports, memoranda, analyses, or communications, relating to the facilities where Separated Children are presently being held, or where it is anticipated that they will be held in the future, including but not limited to:
- a. Any records relating to the plans for housing or detaining Separated Children;
  - b. Any records relating to the roles of staff present at each facility and the descriptions of their roles as they relate to caring for the Separated Children;
  - c. Any records relating to overcrowding, unsafe, or unhygienic conditions in facilities where Separated Children are presently being held or where it is anticipated they will be held in the future;

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<sup>5</sup> See Jonathan Blitzer, How the Trump Administration Got Comfortable Separating Immigration Kids From Their Parents, May 30, 2018 <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>.

- d. Any records relating to the adequacy of the facilities to be used for detaining children;
  - e. Any records, guidance, or training materials relating to the services and/or care to be provided to the separated children, including medical, educational, and other services needed for child development;
  - f. Any records, guidance, or training materials relating to the services, supervision, attention and/or care to be provided to separated children based on the child's age and specific needs;
  - g. Any records relating to known incidents of physical or sexual abuse in any of the facilities where Separated Children are being held.
  - h. Any records relating to forced administration to Separated Children of psychotropic medication
5. A list of the locations where Parents/Guardians of Separated Children are presently being held by DHS, HHS, DOD, DOJ, or any other federal entity, including the facility name, capacity, and location. We also request the name, title, and contact information of the individual in charge of each facility.
6. A list cross-referencing the facility where a Separated Child is held and the facility where that child's parent or adult guardian is held.
7. Any records, including but not limited to reports, memoranda, analyses, trainings, policies or procedures, or communications, relating to DHS, HHS, or any other federal entity's systems for tracking the identity and/or location of the parent or adult guardian of Separated Children.
8. Any records relating to HHS's unaccompanied children reunification task force, including communications between the HHS Assistant Secretary of Preparedness and Response and the ACF Office of Refugee Resettlement, including but not limited to:
- a. Any records related to the expected timing of reunification of Separated Children and Parents/Guardians of Separated Children
  - b. Any records related to the system for tracking the reunification of Separated Children and Parents/Guardians of Separated Children
  - c. Any records relating to the level of personnel and/or resources being devoted to reunification of Separated Children and Parents/Guardians of Separated Children



9. Any information, guidance, training, or other materials that the government has provided to staff at facilities where Separated Children or Parents/Guardians of Separated Children are being held concerning:
  - a. Providing Separated Children and Parents/Guardians of Separated Children with an advisal of their rights;
  - b. Providing age-appropriate care;
  - c. Providing medical or educational services appropriate for child development;
  - d. Prohibiting physical contact between family members;
  - e. Ensuring adequate tracking of Separated Children and their parents/adult guardians;
  - f. Preventing coercion of children or adults.
10. Any records, including but not limited to reports, memoranda, analyses, or communications, relating to the development, adoption, implementation, or monitoring of the implementation of the Executive Order, including but not limited to:
  - a. Any records related to the limitation in Section 2 that “alien family” means only a “legal parent-child relationship”;
  - b. Any records related to the drafting, interpretation, or implementation of Section 3(b), including under what circumstances an alien family will not be detained together because of a “concern that detention of an alien child with the child’s alien parent would pose a risk to the child’s welfare”;
  - c. Any records related to the drafting, interpretation, or implementation of Section 3(c), including a list of the “existing facilities available for the housing and care of alien families.” We also request the name, title, and contact information of the individual in charge of each facility;
  - d. Any records related to the drafting, interpretation, or implementation of Section 3(d), including under what circumstances “[h]eads of executive departments and agencies” are required to make facilities “available to the Secretary, for the housing and care of alien families”;
  - e. Any records related to the drafting, interpretation, or implementation of Section 4, including how the Attorney General intends to “prioritize the adjudication of cases involving detained families”;

- f. Any records related to the effect of the Executive Order on the approximately 2,300 children who were separated from their parents/adult guardians by the federal government prior to issuance of the June 20, 2018 executive order;
  - g. Any records relating to the procedures to be taken to reunite the 2,300 children who were separated from their parents/adult guardians;
  - h. Any records, including memoranda, analyses, or communications, created by or received by OLC, OSG, or DOJ relating to the legality or interpretation of the June 20, 2018 Executive Order;
  - i. Any records reflecting how the Executive Order will be implemented if the Court does not modify the Settlement Agreement in *Flores v. Sessions*, CV 85-4544, including but not limited to whether children will be separated from their parents or adult guardians if the children can no longer legally be detained.
11. Any records regarding the Settlement Agreement in *Flores v. Sessions*, CV 85-4544 (“Flores settlement”), including but not limited to:
- a. Any records related to the drafting, interpretation, or implementation of Section 4(e) of the Executive Order;
  - b. Any records related to the effect or perceived effect of the *Flores* settlement on the Zero-Tolerance Policy and/or Separation of Families Policy/Practice;
  - c. Any records or communications relating to the effect or perceived effect of the *Flores* settlement on the drafting of the Executive Order;
12. Any communications relating to or referring to the separation of children from their parents or adult guardians by the federal government after entry into the United States sent to or received from any of the following individuals or organizations:
- a. John Kelly; Claire M. Grady; Chad Wolf; Katharine Gorka; Thomas Homan; Peter Edge; Thomas Blank; Matthew Albence; James McAment; Tracy Renaud; Daniel Renaud; Kevin McAleenan; Ronald Vitiello; Jeff Sessions; Stephen Miller; Jon Feere; Julie Kircher; Brandon Judd; Brent Bombach; Ben Cassidy; Kevin Chmielewski; Tiffany Cissna; Daniel Cox; Thomas Dinanno; Mario Flores; Gene Hamilton; Harold Hanson; Matt Hayden; Jonathan Hoffman; Roman Jankowski; Elizabeth Johnson; James Johnson; Quinn Jones O'Brien; Julie Kirchner; Kathy Nuebel Kovarik; Scott Krause; David Lapan; Cora Mandy; Michael McKeown; Alan Metzler; Jayne Neumann; Emily Newman; Kirstjen Nielsen; Lora Ries; Dimple Shah; Tracy Short; Craig Symons; Thomas Szold; Kaitlin Vogt; Erin Waters; Frank Wuco; Kris Kobach; James Mattis; Kenneth Wolfe; Noel Francisco;

Jeffrey Wall; Edwin Kneeder; Zack Tripp; Allon Kedem; August Flentje; Sharon Swingle; William Peachey; Colin Kisor; Jeffrey Robins; Sarah Fabian; Chad Readler; the National ICE Council; the Center for Immigration Studies; the National Border Patrol Council; the National CIS Council; or the Federation for American Immigration Reform.

13. Any records relating to or referring to the Separation of Families Policy/Practice sent to or received from any member of Congress, Congressional committee, or Congressional staff, and any records created in preparation for or support of a communication with a member of Congress, Congressional committee, or Congressional staff.
14. Any records relating to or referring to the Separation of Families Policy/Practice sent to or received from any governor of a United States state or territory, gubernatorial staff, or association of governors or state officials (e.g. the National Governors Association, National Conference of State Legislatures), and any records created in preparation for or support of such communication.
15. Any records relating to or referring to the Separation of Families Policy/Practice sent to or received from any state Attorney Generals, and any records created in preparation for or support of such communication.
16. Any records relating to the standards or procedures for prosecuting illegal entry under 8 U.S.C. § 1325(a), including but not limited to:
  - a. Any proposed or actual changes to policies, procedures, or practices for seeking pretrial detention; and
  - b. Any training, guidance, or other communications regarding prosecutions under 8 U.S.C. § 1325(a);
  - c. Any records reflecting plans to ensure that prosecutions under 8 U.S.C. § 1325(a) comply with due process;
17. A list of all search terms used and databases accessed to respond to this FOIA request.

### **FEE WAIVER**

NILC requests a waiver of all costs pursuant to the public interest/benefit fee waiver established by 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the Requestor.”). The public interest/benefit fee waiver provisions of the FOIA are to be “liberally construed” and are “consistently associated with requests from

journalists, scholars, and non-profit interest groups who it was intended to benefit.” *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of fee waivers for FOIA noncommercial requestors.’”) (citation omitted); *see also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (reversing a fee waiver denial that was based on an “unduly restrictive construction [of] the public interest fee waiver provision”).

NILC is a nonprofit national legal advocacy organization that engages in policy analysis, advocacy, education, and litigation to promote and advance the rights of low-income immigrants and their families. NILC serves as an important resource to a broad range of immigrant advocacy groups, community organizations, legal service organizations, and the general public. As part of its work, NILC disseminates information to the public through electronic newsletters, news alerts, issue briefs, trainings, and other educational and informational materials. In addition, NILC disseminates information to individuals, tax-exempt organizations, not-for-profit groups, and members through its website (<http://www.nilc.org>). NILC’s website receives approximately 4,100 visits per day, and many visitors actively download NILC’s reports, brochures, and fact sheets. NILC’s email listserv has about 70,000 subscribers. NILC’s Twitter account has over 51,000 followers.

The records requested are not sought for commercial use, and the Requestor plans to disseminate the disclosed information to the public at no cost. *See* 6 C.F.R. § 5.11(k); 28 C.F.R. § 16.10(k). Disclosure of the requested records is likely to contribute significantly to public understanding of the separation of children and families. The requested information is of great interest to the public at large, but it is not available in the public domain.

In the alternative, we request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by ... a representative of the news media.”). *See also* 6 C.F.R. § 5.11(d); 28 C.F.R. § 16.10(d). If the fee waiver request is denied, while reserving our right to appeal the denial, the Requestor agrees to pay fees up to \$50. If fees are estimated to exceed this limit, please inform us to obtain consent to incur additional fees.

### **EXPEDITED PROCESSING**

Expedited processing is warranted because there is “an urgency to inform the public about an actual or alleged federal government activity” by organizations “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). The harm caused by the separation of children and families threatens “the loss of substantial due process rights.” 6 C.F.R. § 5.5(e)(1)(iii); 28 C.F.R. § 16.5(e)(1)(iii). Moreover, the separation of families has been “[a] matter of widespread and exceptional media interest in which there exist possible questions about

the government's integrity that affect public confidence.” 6 C.F.R. § 5.5(e)(1)(iv); 28 C.F.R. § 16.5(e)(1)(iv). Should you determine that expedited processing is not warranted, the Requestor reserves the right to appeal that decision and expects a response within the twenty-day time limit set forth under 5 U.S.C. § 552(a)(6)(A)(ii).

Disclosure of information regarding the separation of families is particularly urgent given the ongoing trauma that children who have been separated from their families are suffering. Further, questions about the rationales and consequences of the separation of families sow misunderstanding, fear, panic, and distrust in the community.

If this Request is denied in whole or in part, please provide a written explanation for that denial, including references to the specific supporting statutory provisions. To the extent that any requested records are redacted, please redact only the necessary portions and immediately provide us with the remaining portions. If any records, or portions thereof are withheld, please state the exemption claimed and provide a list of the records being withheld.

Finally, without waiving any other appeal rights, the Requestor reserves the right to appeal a constructive denial of this Request as well as decisions to deny expedited processing, to withhold any information, to deny a waiver of fees, or to deny a limitation of processing fees. NILC also reserves the right to challenge the adequacy of the search for responsive documents, the withholding of any documents, as well as any redactions in the materials produced in response to this Request.

I certify that the information contained in this request is true and correct to the best of my knowledge. *See* 6 C.F.R. § 5.5(e)(3); 28 C.F.R. § 16.5(e)(3).

/s/ Nora A. Preciado

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