

July 26, 2018

Sent via U.S. Certified Mail/Return Receipt and Email, Online Portal or Fax

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For the Office of Refugee Resettlement

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*For the Assistant Secretary for
Preparedness and Response*

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*For the Office of the Attorney General and any
Component of DOJ responsible for the
“Tridepartment Plan”*

Re: Expedited Request for Information under the Freedom of Information Act (FOIA)

Dear FOIA Officers:

The Immigrant Defenders Law Center (ImmDef) makes this request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, for records regarding the reunification of parents and children that the U.S. government previously separated. As a result of the separation, those children are being treated as Unaccompanied Children (UACs). ImmDef seeks records from the Department of Homeland Security (DHS), including its sub-agencies Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP); U.S. Citizenship and Immigration Services (USCIS); the Office of Refugee Resettlement (ORR), a sub-agency of Administration for Children and Families (ACF), itself an operating division of Department of Health and Human Services (HHS); Office of the Assistant Secretary of Preparedness and Response, a staff division within HHS (ASPR); and the Department of Justice (DOJ) (including the component involved in the development of the “Tri-Department Plan”¹ and the Executive Office for Immigration Review (EOIR)).

BACKGROUND

“Zero Tolerance” Policy

As early as October 2017, the Trump Administration began an aggressive campaign against parents crossing the southern border with their children. The administration began detaining and criminally prosecuting greater numbers of parents for crossing the border without authorization. When parents were taken into custody, DHS separated them from their children and placed the children in the custody of the ORR.

On April 6, 2018, Attorney General Sessions announced a “zero-tolerance policy,” a 100%

¹ “Tri-Department Plan for Stage II of Family Reunification,” (July 18, 2018), <https://www.hhs.gov/sites/default/files/UAC-Tri-Department-Process.pdf> (hereinafter, “the Tri-Department Plan”).

prosecution policy for those they deem to have entered the country without authorization, further increasing the number of individuals prosecuted for unlawful entry into the U.S. As a result, over 2,300 children were forcibly removed from their parents or adult guardians and placed in detention facilities. In doing so, the U.S. government has created over 2,300 unaccompanied minor children or UACs, as defined by the Trafficking Victims Protection Reauthorization Act (TVPRA).² The children, like children who enter the U.S. without a parent, have been housed in youth shelters and foster placements administered by ORR.³

Public Backlash to Family Separation and Government's New Reunification Policy

After widespread outcry and condemnation of the U.S. government's policy to forcibly separate children from their parents or adult guardians at the border, the U.S. government reaffirmed its "zero-tolerance policy."⁴ Facing litigation, including *Ms. L v. U.S. Immigration and Customs Enforcement*,⁵ the government began reuniting some families. On June 20, 2018, President Trump issued an executive order entitled "Affording Congress an Opportunity to Address Family Separation," in which he emphasized the government's priority of detaining immigrant families together and enforcing the rule of law.⁶ DHS and HHS later released a document providing limited detail on the plans for family reunification, entitled "Fact Sheet: Zero-Tolerance Prosecution and Family Reunification."⁷ The district court hearing *Ms. L* ordered the swift reunification of families on June 26, 2018.⁸ Finally, on July 18, 2018, the Department of Justice, DHS, and HHS released a "Tri-Department Plan for Stage II of Family Reunification."⁹

² William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008, Pub. L. 110-457, § 235(g), 122 Stat. 5044 (2008); *see also* 6 U.S.C. § 279(g).

³ Office of Refugee Resettlement, *About Unaccompanied Alien Children's Services* (June 15, 2018), <https://www.acf.hhs.gov/orr/programs/ucs/about>; *see also* Office of Refugee Resettlement, *Unaccompanied Alien Children Frequently Asked Questions* (July 9, 2018) ("Q: Why is HHS caring for children separated from their parents? A: When a child who has entered the country illegally and is not accompanied by a parent or legal guardian, he or she is considered an unaccompanied alien child, and by law must be transferred to the Office of Refugee Resettlement for care and custody. . . ."), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions>.

⁴ *See* Nick Miroff, *Facing Outcry Over Family Separations, DHS Chief Says, 'We Will Not Apologize'*, Wash. Post (June 18, 2018), https://www.washingtonpost.com/world/national-security/facing-outcry-over-family-separations-dhs-chief-says-we-will-not-apologize/2018/06/18/d1e85466-7305-11e8-9780-b1dd6a09b549_story.html?noredirect=on&utm_term=.9e7ff0faa5c8.

⁵ Case No. 3:18-cv-00428 (S.D. Cal.).

⁶ Executive Order, Trump, Donald J., *Affording Congress an Opportunity to Address Family Separation* (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

⁷ Dep't of Homeland Sec., *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification* (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.

⁸ *Ms. L v. U.S. Immigration and Customs Enforcement*, ECF No. 83, No. 3:18-cv-00428 (S.D. Cal. June 26, 2018).

⁹ *See supra* note 1.

Ongoing Confusion Regarding Reunification Policies

These limited public documents regarding family reunification policies have left significant uncertainty regarding the policies, procedures, protocols, or practices governing the actions of the various U.S. government agencies engaged in family reunification. ImmDef is one of the largest nonprofit providers of deportation defense in California, representing both detained parents and UACs in ORR custody. This uncertainty has undermined ImmDef's representation of its clients. ImmDef has seen a greater number of UAC clients being reunified with a parent who is either out of custody or in a third detention facility, run by ICE or another DHS sub-agency. In those instances, even where ImmDef had a G-28 (notice of appearance of an attorney) filed on behalf of the child, DHS stopped all communication between the attorney and the child upon transfer. This made it impossible for ImmDef to effectively represent the child or understand what was happening to the child and the child's legal case.

The lack of public information on the U.S. government's policy regarding the reunification of families it previously separated causes ImmDef and other legal service providers, case workers, and other service providers extreme difficulty in serving their clients. It also undermines public trust. It is unclear what the U.S. government considers the process of reunification to entail, and whether the agencies involved are taking appropriate safeguards when taking over custody of vulnerable children who have been traumatized and who should be afforded continued protections under the TVPRA.

RECORDS REQUESTED

ImmDef seeks records¹⁰ from DHS (including sub-agencies ICE and CBP separately), ORR, ASPR, USCIS, DOJ (including the component involved in the development of the "Tri-Department Plan" as well as EOIR) regarding policies to reunify migrant parents and children whom the U.S. government separated due to the "zero-tolerance" policy or other enforcement actions by DOJ or DHS. ImmDef seeks responsive records held from October 1, 2017 until the time that a responsive records search is conducted. In the detailed requests below, ImmDef uses the term "policies" to include policies, plans, procedures, protocols, guidance, guidelines, legal opinions, memoranda, training manuals, instructions, and orders.

These records include, but are not limited to:

¹⁰ 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.

1. Records relating to the policy summarized in the Tri-Department Plan for Stage II of Family Reunification, including:
 - a) Any policies governing how “HHS reviews and assesses summaries of criminal background check information,” and any forms or checklists used in that process;
 - b) Any policies governing how ICE provides criminal background check information from the National Crime Information Center, including what information will be provided to HHS;
 - c) Any policies governing HHS review of a case file to find parentage or identify “red flags,” including any forms or checklists used in that process;
 - d) Any policies governing HHS review of the case file to confirm that “records raise no questions regarding parental fitness or child safety” or to determine whether a home study is necessary, including any forms or checklists used in that process;
 - e) Any policies governing HHS interviews of parents in ICE custody, including any forms, talking points, scripts or checklists used in that process;
 - f) Any policies governing ICE or another agency’s transportation of parents to reunification sites;
 - g) The “Logistical Plan Executed by ORR”¹¹ for transportation of children for reunification;
 - h) Any policies governing HHS transportation of a child for reunification, including policies regarding how to determine whether medications or other necessities will be transported along with the child and ensuring that such necessities are provided and/or administered to the child;
 - i) Any policies governing the transfer of a child from HHS to ICE custody, including any forms or checklists used in the process; and
 - j) Any policies governing reunification for parents who are not in ICE custody.
2. Any policies governing migrant family reunification that are inconsistent with or not reflected in the Tri-Department Plan for Stage II of Family Reunification.
3. Any policies governing the identification of parents (or other relatives) who had been separated from their children (or children in their care) by U.S. immigration or law enforcement officials.

¹¹ Tri-Department Plan, *supra*, note 1, at p. 7.

4. Any policies, memoranda of understanding, or agreements regarding the transportation of children from the custody of a DHS agency to ORR or from ORR to the custody of a DHS agency, including any policies provided to contractors to effect such transportation.
5. Any policies governing whether, for cases in which the parent and child were previously detained separately in ICE and ORR custody, respectively, the decision whether children and their parents will remain in ICE detention after reunification or will be released from detention—including what factors, protocols, or other criteria are considered in making the decision of whether to detain or release the reunified family.
6. Any policies governing whether a parent who has previously been released from detention will be re-detained with his or her child following reunification, including what factors, protocols, or other criteria are considered in making the decision of whether to detain or release the reunified family.
7. Any policies governing cases in which the parent has already been deported from the United States but the child remains in ORR custody.¹²
8. Any policies governing cases in which the parent has an outstanding order of removal but a previously separated child does not have an order of removal, including any policies to protect the due process rights of a child in such a situation.
9. Any policies governing the treatment of attorney-client relationships for children who are transferred from ORR to DHS (including sub-agencies ICE and CBP) custody or reunified with a parent and released from DHS custody, including:
 - a) Any policies regarding how and when communication between the child and the child's attorney or other representative with a G-28 on file will be facilitated;
 - b) Whether there is a prohibition on or practice of prohibiting communications between the child and the child's attorney or other representative with a G-28 on file;
 - c) Any policies for giving notice, advanced or not, to attorneys or other legal service providers who have G-28s on file for child clients who are transferred from ORR to ICE custody.
10. Any policies governing the treatment of children in ICE custody following reunification, including:

¹² Recent reports confirm there are at least 450 separated families in this situation. *See* Heather Timmons, *New Data Shows the U.S. Government Kept Hundreds of Immigrant Kids, and Deported their Parents*, QUARTZ (July 25, 2018), <https://qz.com/1335561/hundreds-of-immigrant-kids-were-kept-in-us-custody-while-their-parents-were-deported/>.

- a) Any policies governing how ICE or another DHS sub-agency ensures continuity of care for the child, especially if the child is traumatized and was receiving medical or psychological services or special educational services in the ORR shelter from which custody was transferred;
 - b) Any policies governing how ICE or another DHS sub-agency accommodates adults and children together, including what access to mental, medical, and educational services the children have; what food, water, hygiene, bedding, comfortable temperatures, exercise, freedom of movement, and other provisions the families have; and what, if any, work the adults and children are required to perform, such as cleaning the facilities in which they are housed.
11. Any communication, policies, memoranda, rules, regulations, guidelines, legal opinions, or other records DHS (including sub-agencies ICE and CBP), ORR, EOIR, USCIS, and DOJ have internally established, adopted, or considered, if any, with respect to maintaining and recognizing TVPRA protections for children who were previously separated from their parents or adult guardians by the U.S. government after they are reunited with their parents.
 12. Any policies regarding compliance with the injunction in *Orantes-Hernandez v. Gonzales*, Doc No. 855, No. 2:82-cv-01107 (C.D. Cal. Nov. 26, 2007), for children who are or have been in ORR custody and parents who are or have been separated from their children.
 13. Records related to any communication between DHS (including sub-agencies ICE and CBP) and EOIR with respect to whether to withdraw a Notice to Appear (NTA) that has already been filed in the case of a child who was previously separated and placed with ORR but who has been or will be reunited with a parent. These records should include evidence of EOIR's decision whether to relinquish jurisdiction over the child's INA § 240 proceedings and any other actions or steps that are taken by the relevant agency/agencies in those circumstances.
 14. Records related to any policies governing how ORR, EOIR, and ICE will address children to be reunified who have already received an NTA for INA § 240 proceedings but whose parent(s) have already received a negative credible fear determination and are being placed in expedited removal proceedings under INA § 235, including but not limited to cases in which the child has already been scheduled for an asylum interview.
 15. Any policies regarding the re-issuance of an NTA or other re-processing of an adult to whom an NTA has issued, after the adult is reunified with a child.
 16. Any forms or other papers provided to parents or children during the course of apprehension, separation, and reunification, including any instructions provided to individuals in government custody regarding how to fill out the forms, and any other

policies governing the forms or other papers provided to parents or children during the course of apprehension, separation, and reunification.

17. Records pertaining to any audits or oversight conducted of ORR and DHS (including sub-agencies ICE and CBP) during the reunification process, and any reports related to these activities.
18. Any contracts signed with agencies or companies outside DHS for the planning, implementation, and operation of the family reunification process, including but not limited to contracts or memoranda of understanding (MOUs) reflecting any policies or practices for how and according to what processes private contractors are to transport separated children from DHS custody to ORR custody, or vice-versa.
19. All MOUs or agreements pertaining to the family reunification process between agencies within DHS or with other federal or state or local agencies.
20. Any policies pertaining to the protection of privacy for individuals whose information is used and/or transferred in the family reunification process.
21. Any policies pertaining to the protection of civil rights and civil liberties and avoidance of racial and ethnic profiling for individuals whose information is used and/or transferred in the family reunification process.

FEE WAIVER

ImmDef 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 Requester.”). 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 noncommercial requesters.’”) (citation omitted); *see also Carney v. U.S. Dep’t 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”).

ImmDef is one of the largest nonprofit providers of deportation defense in California. ImmDef focuses on helping immigrants who are in some of the most legally complicated situations, including unaccompanied children and youth who arrived alone to the U.S. and now face deportation, adults with mental health challenges, and legal permanent residents facing deportation due to unlawful convictions. ImmDef also works to empower its child clients with knowledge

about the system in which they are entangled through its Detained Youth Empowerment Project, which provides “Know Your Rights” classes and legal screenings for all children detained in shelters in the greater Los Angeles area. ImmDef’s Children’s Representation Project provides representation and pro bono placement (referrals for free representation by outside attorneys) for more than 500 children each year, including refugees, unaccompanied children, and foster youth.

ImmDef also represents immigrant children in shelters or federal long-term-foster care, or who have been released to sponsors within the jurisdiction of the Los Angeles Immigration Court (a sub-component of EOIR). ImmDef’s representation is full-scale deportation defense, which includes advocacy before EOIR, USCIS, and California state courts. In addition, ImmDef is a member of the California Coalition for Universal Representation, a statewide network of organizations that advocates for access to counsel for all immigrants facing deportation, and routinely engages in advocacy and communications work to support access to counsel for immigrants in deportation proceedings. In July 2018, ImmDef launched a two-year Family Unity Project funded by philanthropic sources to specifically serve families who were subject to family separations. To date, this project has supported the provision of legal services to more than 15 families.

The records requested are not sought for commercial use, and ImmDef 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); 45 C.F.R. § 5.54. Disclosure of the requested records is likely to contribute significantly to public understanding of how families are experiencing the forcible separation from and potential reunification with each other, and how this separation and reunification affect their legal cases. This information will also help ImmDef and other immigration legal and other service providers best represent their clients who have been separated from their 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, ImmDef requests 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)(1); 45 C.F.R. § 5.53(b). If the fee waiver request is denied, while reserving its right to appeal the denial, ImmDef agrees to pay fees up to \$50. If fees are estimated to exceed this limit, please inform ImmDef 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, ImmDef 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 and subsequent attempted re-unification of families is particularly urgent given the ongoing trauma that children who have been separated from their families are suffering and concerns for continuity of care.¹³ Public reports have indicated that the relevant agencies were unprepared for the task of reunifying the families they had separated.¹⁴ Further, questions about the rationales and consequences of the separation of families—and now, the process of reunifying them—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 reference 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, ImmDef 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. ImmDef 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.

¹³ See, e.g., *J.S.R. by and through J.S.G. v. Sessions*, Ruling and Order on Motion for a Preliminary Injunction, No. 3:18-cv-01106-VAB, 2018 WL 3421321 (D. Conn. July 13, 2018) (ordering government to address the diagnosed and severe PTSD suffered by two children separated from their parents).

¹⁴ See, e.g., Nick Miroff, Maria Sacchetti & Amy Goldstein, *In D.C. Command Center, Officials Work to Reunite Migrant Children by Court Deadline*, WASH. POST (July 19, 2018), <https://wapo.st/2OhQarv>.

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); 45 C.F.R. § 5.27(a).

If you have any questions, please contact me directly by phone at (202) 609-9978 or via email at rosenthal@nilc.org. Thank you in advance for your prompt response to this request.

Sincerely,

s/ Joshua A. Rosenthal

On Behalf of the Immigrant Defenders Law Center

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