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

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

Dear FOIA Officers:

This is a request made under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. §552 *et seq.* Asylum Access and the Immigrant Defenders Law Center are represented for the purposes of this request by the National Immigration Law Center.

Asylum Access and the Immigrant Defenders Law Center make this request for information and records regarding 1) the coordination between the United States and agencies or officials of the Mexican government for the purpose of metering, waitlisting, vetting, impeding and/or preventing asylum seekers from accessing ports of entry at the southern border of the United States, 2) the processing of asylum applicants who present themselves at ports of entry along the southern border of the United States, 3) the detention of asylum applicants who present themselves for processing at ports of entry at the southern border.

Accordingly, Asylum Access and the Immigrant Defenders Law Center seek records from the Department of Homeland Security (DHS), including its sub-agencies Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS); the Office of Refugee Resettlement (ORR); the Department of Justice Executive Office for Immigration Review (EOIR); and the US Department of State (USDOS) as set forth below.

BACKGROUND

Unclear Policies and Procedures for Processing Asylum Applicants

It is imperative that the US government be transparent about its policies and procedures for processing asylum claims at our southern border. Recent US policies that have engendered confusion include the “turnback policy,” the “metering policy” and the “remain in Mexico” plan. The “turnback policy” appears to direct CBP officials to turn back asylum seekers at the border before their asylum claims are properly and lawfully heard.¹ CBP has alleged that this policy is necessary due to capacity concerns and appears to collaborate with Mexican officials as well as third parties to execute a metering or waitlist system which imposes a daily cap on the number of asylum seekers that can present their asylum claims at various ports of entry.² This so-called “metering policy” has forced asylum seekers to endure prolonged and life-threatening delays before they are able to exercise their legal right to seek asylum in the United States.³

¹ Complaint at ¶3, *Al Otro Lado v. Nielsen*, (S.D. Cal. 2018) (No. 3:17-cv-02366-BAS-KSC); https://www.splcenter.org/sites/default/files/documents/189_second_amended_complaint_0.pdf.

² *Id.*; Kirk Semple, *What is ‘La Lista,’ Which Controls Migrants’ Fates in Tijuana?* NEW YORK TIMES (Nov. 30, 2018).

³ Complaint, *supra* note 1, at ¶3.

On December 20, 2018, Secretary of Homeland Security, Kirstjen Nielsen, announced what is now widely called the US Government's "Remain in Mexico" policy.⁴ In doing so, Secretary Nielsen proclaimed that "individuals arriving in or entering the United States from Mexico -- illegally or without proper documentation -- may be returned to Mexico for the duration of their immigration proceedings."⁵ As of January 25, 2019, the Trump Administration had begun implementing the announced policy at the nation's busiest border crossing in San Diego (San Ysidro).⁶ Pursuant to the new policy, asylum seekers from countries other than Mexico will be given a Notice to Appear for their immigration court hearing and will be returned to Mexico to wait, pending their hearing date. The Mexican government has said it would not impede this new practice by the United States while also stating it does not support the Trump Administration's policy change.⁷

In addition to significant policy changes, the standards and practices governing the processing of asylum seekers have become vague, unclear, and inconsistently enforced in practice. This unpredictability has created significant challenges for asylum applicants as well as the immigration agencies and organizations working in the United States and Mexico who seek to assist them.

Coordination between the US and Mexico to Prevent Asylum Seekers from Reaching the US

There have been numerous reports that the United States and Mexico have been collaborating to prevent asylum seekers from reaching the southern border of the United States -- collaboration which has been confirmed by members of Mexico's immigration agency, the Instituto Nacional de Migración (INM). In June 2018, a senior Mexican immigration official reported that the US had asked INM to stop asylum seekers being pushed back to Mexico at the Nogales border crossing and to check their documents.⁸ The official reported that he understood the US to be implicitly requesting that INM deport those who had no legal status in Mexico.⁹ That same

⁴ Kirstjen M. Nielsen, Department of Homeland Security, Memo Announcing "Migration Protection Protocols" (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>

⁵ *Id.*

⁶ Richard Gonzales, *US is Rolling Out Its 'Remain in Mexico' Policy on Central American Asylum Seekers*, NPR (January 24, 2019), <https://www.npr.org/2019/01/24/688470513/u-s-plans-to-enforce-remain-in-mexico-policy-on-central-american-asylum-seekers>.

⁷ Maya Averbuch, *Mexico Rebukes - But Accepts - 'Unilateral' U.S. Move to Return Asylum Seekers Pending Hearing*, The Washington Post (Jan. 25, 2019), https://www.washingtonpost.com/world/the_americas/mexico-rebukes--but-accepts--unilateral-us-move-to-return-asylum-seekers-pending-hearing/2019/01/25/52062470-202b-11e9-a759-2b8541bbbe20_story.html?utm_term=.8dfeb26d0968

⁸ Amnesty Int'l, USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States 21 (2018), <https://amnesty.org.pl/wp-content/uploads/2018/10/AMR05191012018-EN-digital.pdf>.

⁹ *Id.*

month, other immigration officials reported that CBP was requesting that Mexican officials “collect” people at the border who were seeking protection but lacked papers, and this resulted in refugees being physically stopped from accessing American ports of entry.¹⁰ Prior to this, on April 29, 2018, the head INM delegate in Baja California reported that CBP had asked INM to remove twenty people seeking asylum from the San Ysidro Port of Entry turnstiles as well as other refugees who were present at the nearby El Chaparral plaza.¹¹ Per an INM agent, implicit in CBP’s request “was that such detentions could result in INM deporting those asylum seekers who were not legally present in Mexico.”¹² Currently, on a daily basis at the El Chaparral border crossing in Tijuana, asylum seekers are coordinated by INM and transported by Mexican authorities to the US Port of Entry at San Ysidro, indicating close collaboration between the US and Mexican agencies. Further, in November and December 2018, attorneys from the Immigrant Defenders Law Center witnessed asylum seekers being turned away by CBP officers at US ports of entry in Tijuana and Mexicali and being directed to speak with INM or Grupos Beta, another Mexican immigration agency, in order to get on a pre-approved list to access the port of entry for the purposes of seeking asylum.

Detention of Asylum Seekers

Asylum seekers who have presented themselves to US officials are often detained for long periods of time following their credible fear interviews.¹³ Once a person establishes a credible fear, parole into the US is considered on a case-by-case basis and may be granted in certain situations.¹⁴ In 2009, ICE issued guidance as to when continued detention is not in the public interest stating that if, absent additional factors, the applicant can sufficiently prove their identity and show they are not a flight risk or a danger to the community, they should be paroled as their continued detention is not considered to be in the public interest.¹⁵ In July 2018, the a federal district court in Washington, DC issued an injunction requiring ICE to comply with its 2009 directive when adjudicating the detention of asylum seekers.¹⁶

Despite this injunction, there remain concerns that people are still not getting the individualized assessments pursuant to the directive’s requirements.¹⁷ Moreover, the extraordinary consequences of the government’s family separation policy underscore the significance of transparency on all matters related to the detention of asylum seekers.

¹⁰ Complaint, *supra* note 1, at ¶74.

¹¹ Amnesty Int’l, *supra* note 12, at 24.

¹² *Id.*

¹³ See <https://www.amnestyusa.org/campaigns/refugee-and-migrant-rights/>

¹⁴ 8 C.F.R. § 212.5; 8 C.F.R. § 235.3.

¹⁵ ICE Directive No. 11002.1 *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution*, (Dec. 8, 2009).

¹⁶ *Damus v. Nielsen*, 313 F.Supp.3d 317 (2018).

¹⁷ Robert Moore, *US Immigration Officers Accused of Refusing Parole for Asylum Seekers*, The Guardian, (Aug. 22, 2018).

RECORDS REQUESTED

Together, Asylum Access and the Immigrant Defenders Law Center seek records¹⁸ from DHS (including its sub-agencies ICE, CBP, and USCIS separately), ORR, USDOS and EOIR regarding coordination between the United States and the Mexican government to process, meter and/or prevent asylum applicants from reaching the United States, the management and processing of asylum applicants at US ports of entry, and the detention of asylum applicants.

For each of the requests below, the term “policies” is used to include all policies, plans, procedures, protocols, guidance, guidelines, legal opinions, memoranda, training manuals, communications, instructions, and orders. The term “including” is used to mean “including, but not limited to.”

The requested records include:

Coordination with Mexican Authorities Regarding Asylum Applicants

1. Records relating to any agreements (either formal or informal) between the United States (or its agents or representatives) and Mexico (or its agents or representatives) regarding efforts to meter, coordinate, screen, waitlist or impede asylum applicants seeking access to US ports of entry on our southern border.
2. Documents reflecting any coordination between the United States (or its agents or representatives) and Mexico (or its agents or representatives) aimed at reducing the number of asylum applicants accessing ports of entry at the southern border, including any communications regarding the past, present, or future number of such asylum applicants.
3. Any records, including notes, emails, phone logs, schedules, calendars, directives, meeting minutes, transportation instructions and guidelines related to coordination, cooperation, or communication between Customs and Border Protection officers and the INM and/or Grupos Beta organizations in Mexico.

¹⁸ As used herein, the term “records” includes but is 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, training manuals, questionnaires, and 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.. Further, the request extends to all records including those preserved in both written and electronic form.

4. Any records related to communication between officials from the United States and Mexican government officials related to the “list” of asylum seekers being kept by INM and/or by asylum applicants in Tijuana for the purposes of metering, queuing, or scheduling the entry of asylum seekers.
5. Any communication records, including emails, cables, faxes, call logs, and calendar entries, between immigration officials in the United States and authorities in Mexico about the detention, vetting, deportation, or checking travel documents of asylum applicants in Mexico who are seeking access to the US ports of entry, including any actual or suggested policies governing those actions.
6. Any communication between officials in the United States and authorities in Mexico regarding policies or procedures related to unaccompanied minor children attempting to access US ports of entry.
7. Any records related to the Migrant Protection Protocols, as described in a January 24 FAQ document from DHS¹⁹ and a January 25 Policy Guidance document²⁰ including
 - a) The text of the Protocols
 - b) Any records related to the development of the Protocols;
 - c) Any records related to communication about draft or final versions of the Protocols with Mexican authorities;
 - d) Any records related to the assessment of whether an asylum seeker is likely “to face persecution or torture in Mexico”;
 - e) Any records related to the definition of “vulnerable populations” who may be excluded from application of the policy;
 - f) Any records related to the statement in the FAQ document that “While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them”; and

¹⁹ <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

²⁰ https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf

- g) Any records related to USCIS Policy Memorandum PM-602-0169, issued January 28, 2019, entitled “Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols.”

The Management and Processing of Asylum Seekers

- 8. Records relating to the policies and procedures governing how asylum seekers are processed at ports of entry along the southern border of the United States, including:
 - a) Any directives, policies, or emails related to guidelines for the processing of unaccompanied minor children presenting at the port of entry;
 - b) Any policies or practices governing the process by which asylum seekers are informed of the process of requesting asylum and/or a credible fear interview;
 - c) Any policies governing the order in which asylum seekers are received, reviewed, or processed;
 - d) Any policies (either formal or informal) related to prerequisites for asylum applications to be received, reviewed, and processed. This includes but is not limited to: requirements that applicants present identification or travel documents, policies requiring applicants put their names on any sort of a list, and policies related to management and control of the list of applicant names.
- 9. Records relating to the number of asylum applications received, credible fear interviews granted, and applications approved or denied for 2018, 2017, and 2016, including:
 - a) Records reflecting how many asylum applications were received by the government of the United States in 2018, 2017, and 2016.
 - b) Records reflecting how many credible fear interviews were given to asylum applicants in 2018, 2017, and 2016.
 - c) Records reflecting the outcome of the credible fear interviews granted for 2018, 2017, and 2016.
- 10. Records related to the standards and processes of assessing the ‘credible fear’ of asylum applicants, including:

- a) Any policies or standards (including rubrics, metrics, assessments, instructions, interview questions, or guidelines) used by immigration officers to determine whether credible fear exists.
 - b) Any policies or practices related to the training agency officers receive for evaluating credible fear.
 - c) Any oversight or internal audit practices that exist to review or monitor the credible fear determinations made by agency officers or office locations.
 - d) Any documentation or forms that are created, updated, provided, or preserved by agency officers during the credible fear interview to document and / or justify their determinations.
11. Records related to policies and procedures regarding access to legal representation and interpreters, including:
- a) The number of asylum applicants in 2018 and 2017 who had legal representation during their credible fear interview, as well as the number that requested legal representation (whether they received it or not).
 - b) The number of asylum applicants in 2018 and 2017 who had interpreters present during their credible fear interviews, as well as the number that requested interpreters (whether they received them or not).
 - c) Any policies or procedures that govern how requests for attorneys or interpreters during the credible fear interview are handled by US government agents or officials.

Detention of Asylum Applicants and Family Separation

12. Records relating to the policies and procedures that govern how determinations of detention are made for asylum seekers and their families, including:
- a) Any policies, guidelines, or considerations that relate to determinations about whether asylum applicants are held in detention while their applications are under review.

- b) Any records that document or show how policies and practices related to the detention of asylum applicants have changed over the last two years, including any former policies or practices from that time period.
 - c) Any records or policies that establish which factors will be considered, influence or determine where asylum applicants are held in detention.
13. Records that document how many asylum seekers were held in detention during 2018 and 2017 (both overall, and as broken down by the applicants' countries of origin).
 14. Records that document how many of the asylum seekers detained in 2018 and 2017 ultimately had their application for asylum approved (both overall, and as broken down by the applicants' countries of origin).
 15. Records that document how long asylum seekers were held in detention during 2017 and 2018.
 16. Records that reflect how many families were impacted by the US government's family separation policy²¹ in 2018 as well as how many families remain separated as of January 1, 2019, including any records provided to or considered by the ORR Office of the Inspector General related to the investigation and preparation of report number OEI-BL-18-00511, published on January 17, 2019.
 17. Records related to the processing of this request, including records sufficient to determine all search terms used to complete the request, locations and custodians searched, and any documentation or tracking sheets of the processing of this request.

FEE WAIVER

Pursuant to 5 U.S.C. §552(a)(4)(A)(iii), we petition for a full waiver of fees incurred in response to this request.

²¹ The US Government's family separation policy includes DOJ's announced Zero tolerance policy and other detention of adults and/or children at ports of entry or of purported border crossers, which had the effect of separating relatives who had presented together at a port of entry or crossed the southern border of the United States together.

The plain language of the statute provides: “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.” 5 U.S.C. §552(a)(4)(A)(iii).

Judicial precedent dictates that the public interest/benefit fee waiver provisions 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.” *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.’”); *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”).

Asylum Access is an international non-profit organization dedicated to improving access to and protection of refugee rights around the world. Asylum Access is headquartered in California. Working at the grassroots level, Asylum Access offers legal empowerment and legal aid services to refugees in Africa, Asia, and Latin America. In addition to direct service, Asylum Access is also involved in policy reform, global systems change, and advocacy to help build sustainable solutions that enable refugees to provide for themselves and contribute to their communities. Each year, the legal aid work of Asylum Access directly impacts more than 20,000 refugees. Through positive policy changes, Asylum Access has benefited more than two million refugees since it began.

The Immigrant Defenders Law Center is one of the largest non-profit providers of deportation defense in California. Immigrant Defenders Law Center focuses on helping immigrants who are in some of the most legally complicated situations, including unaccompanied children and youth who arrive alone in the US and face deportation, adults with mental health challenges, and lawful permanent residents facing deportation due to unlawful convictions. The Immigrant Defenders Law Center also works to empower its child clients with knowledge about the system in which they are entangled through “Know Your Rights” classes and legal screenings for all children detained in shelters in the greater Los Angeles Area. The Immigrant Defenders Law Center’s Children’s Representation Project provides representation and pro bono placement for more than 500 children each year, including refugees, unaccompanied children, and foster youth.

The records requested are not sought for commercial use and both Asylum Access and the Immigrant Defenders Law Center plan 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.

Currently there is a great deal of confusion about the specific policies and procedures at the heart of this request, with a direct impact on tens of thousands of people annually. The information obtained through this request will significantly improve public understanding of the agencies’ policies and also help decrease the broad confusion currently held by the American public on these issues. Disclosure of the requested records will also help Asylum Access, the Immigrant

Defenders Law Center, and other civil society organizations provide accurate representation and better serve their clients. This information is of great interest to the public at large, but it is not available in the public domain.

In the event our request for fee waiver is denied, Asylum Access and the Immigrant Defenders Law Center then 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)(1); 45 C.F.R. §5.53(b).

Finally, if the request for fee waiver is denied, and while reserving the right to appeal the denial, Asylum Access and the Immigrant Defenders Law Center agree to pay fees up to \$100. If fees are estimated to exceed this limit, please inform Asylum Access and the Immigrant Defenders Law Center, through their counsel at the National Immigration Law Center to obtain authorization and approval prior to incurring additional fees.

EXPEDITED PROCESSING

Through this submission we further seek expedited processing of our FOIA request on several bases.

First, 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). Both Asylum Access and the Immigrant Defenders Law Center engage in significant information-dissemination activities. In addition to its pro-bono legal representation of immigrants in detention, ImmDef serves as a valuable resource to fellow practitioners and advocates. For instance, ImmDef conducts “Know Your Rights” trainings and legal screenings in the greater Los Angeles area. It provides these trainings and more technical trainings for hundreds of participants, including state and local officials. Given the needs of vulnerable immigrant populations, ImmDef provides additional trainings in the for non-legal service providers who offer mental health counseling and social services. It also engages communities more generally, offering information to both immigrant and non-immigrant communities. Frequently, the organization partners with the California Department of Social Services as a source of technical assistance on immigration law topics.

ImmDef engages in advocacy with lawmakers at the local, state and federal level in a variety of initiatives. One of its most notable advocacy projects is centered on universal access to counsel for all immigrants facing deportation. ImmDef’s work contributed to the introduction of a bill in the California Senate which would ensure all immigrants facing deportation in California have qualified immigration attorneys representing them.

ImmDef has a strong social media presence with more than 5,000 subscribers across multiple platforms. The organization uses this avenue to provide free and thorough access to any and all government records it requests. Similarly, ImmDef staff regularly appear on national news networks, such as CNN and MSNBC to provide expert analysis on notable immigration policies and activities. In one such instance, Lindsay Toczyłowski, Executive Director of ImmDef, has appeared on CNN to highlight the difficulties fellow attorneys face when representing minors in front of immigration judges.²² Thus, the work undertaken by ImmDef not only benefits its own clients, but also serves to educate the general public on important developments in the immigrant defense field.

Like ImmDef, Asylum Access engages with direct, pro bono, legal aid and legal advocacy for refugee clients across multiple offices in Mexico. They also hold community trainings to inform clients about the asylum processes in the United States and Mexico, to apprise clients of their legal status, and to help them make informed immigration decisions.

Beyond the direct client work, Asylum Access engages with all levels of government on asylum policy matters and advocacy initiatives. They also collaborate with other civil society organizations operating in the immigration space and partner with the private sector to improve access, opportunity, and security for asylum seeking immigrants in Mexico. Through this broad variety of programs and outreach efforts, Asylum Access engages in information dissemination to immigrants, government officials, other non-profit organizations, and the private sector. Moreover, Asylum Access is regularly contacted by well-known media organizations like Reuters, trying to collect information about the US asylum process as well as what is happening at the southern border.

For all the essential functions of the organization, it is imperative to have complete and accurate information about the US government policies and practices as they relate to the processing of asylum claims at the southern border.

Second, the harm caused by arbitrary, uncertain, and inconsistently enforced asylum processing procedures and standards 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 Central American migrant caravan, the ongoing surge in asylum applications, and the Remain in Mexico plan/Migrant Protection Protocols have, together, 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). For example, differing accounts of the Mexican government’s engagement in the plan, as described above, generate questions about the accuracy of governmental representations about the policy.

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

²² CNN, Immigration Attorney Represented 3-Year-Old, Youtube (Jun 29, 2018), https://www.youtube.com/watch?v=GdmZ_4SmDYQ.

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, and without waiving any other appeal rights, Asylum Access and the Immigrant Defenders Law Center reserve 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. Asylum Access and the Immigrant Defenders Law Center also reserve 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.

Sincerely,

s/ Joshua Rosenthal

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