November 20, 2018

FOIA Appeals
Policy and Litigation Branch
U.S. Customs and Border Protection,
90 K Street, NE, 10th Floor
Washington, D.C. 20229

Subject: Freedom of Information Act Appeal (CBP-2018-070727)

To whom it may concern:

This letter appeals the September 14, 2018, response to a FOIA request submitted by Open the Government (OTG) and the Project On Government Oversight (POGO) on July 13, 2018, seeking records relating to the Department of Homeland Security's family separation policy.[1]

On September 14, 2018, U.S. Customs and Border Protection (CBP) (Enclosure 1) indicated that 97 pages of documents were retrieved in response to our July 13, 2018 FOIA request (Enclosure 2). CBP determined that 33 of these pages were to be partially released, with redactions made pursuant to Title 5 U.S.C. § 552 (b)(2), (b)(6), (b)(7)(C), and (b)(7)(E); 45 pages were approved for release in their entirely; and 19 pages were denied in full, also pursuant to Title 5 U.S.C. § 552 (b)(2), (b)(6), (b)(7)(C).

We request that the reviewing authority closely examine the records in this case to ensure that CBP has not improperly withheld records under FOIA exemptions (b)(7)(C) and (b)(7)(E). An additional review of all redacted and withheld information is merited, on the grounds that CBP has failed to satisfy Exemption (b)(7)'s threshold requirements and incorrectly asserted that their redactions for several of the responsive records are proper.

Exemption 7 permits agencies to withhold "records or information compiled for law enforcement purposes," provided they satisfy the requirements of one of the exemption's subparts, (A) to (F). 5 U.S.C. § 552(b)(7). Courts have held that to prevail on an Exemption 7 claim, an agency must demonstrate (1) the information was "'compiled for law enforcement purposes,' and (2) disclosure would produce one of the specified harms enumerated in the statute." *Davin*, 60 F.3d at 1054 (citing *U.S. Dep't of Justice v. Landano*, 508 U.S. 165 (1993); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 622 (1982)).

[1] CBP's September 14, 2018 response letter and the July 13, 2018 FOIA request are attached as enclosures 1 and 2, respectively.

Records cannot be considered prepared for law enforcement purposes simply by virtue of the function the agency serves. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987) (quoting from *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986)). Yet CBP appears to have attempted to tie their use of Exemption 7 to CBP's general law enforcement mandate and has failed to explain how the documents in this case were compiled for law enforcement purposes.

For example, it is hard to imagine how disclosure of information in a memo dated July 2, 2018, entitled "Updates to e3 System" could risk circumvention of the law. This memo discusses CBP's "efforts to maximize efficiencies and streamline reporting." The memo appears only to address updates to information collection practices, and does not appear to be written for any particular law enforcement purpose. It is entirely unclear how disclosure of the three paragraphs in this memo, or segregable portions of this memo, would disclose techniques and/or procedures "compiled for law enforcement purposes."

Any such techniques and procedures that CBP claims are contained in the withheld material are likely well known to the public. The e3 reporting system, for example, is discussed in detail in the latest CBP Privacy Impact Assessment Update for the e3 portal (dated August 9, 2017).[2] The PIA provides a detailed assessment of the new e3 modules that are used for existing functions, and updates to the existing modules, such as the e3 Homepage, e3 Intake, e3 apprehension Log, e3 Processing, e3 Prosecutions, e3 Biometrics, and e3 OASISS. We request that the reviewing authority closely examine the 1-page memo to determine whether it in fact contains sensitive information that is not contained in the very detailed 18-page Privacy Impact Assessment Update. The reviewing authority should also compare the memo to other publicly available material as well, including the November 2017 GAO report on "Southwest Border Security," which also discusses the e3 system in detail.[3]

Additionally, on September 27, 2018, the DHS Inspector General released a report on the "Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy," containing information on the exact same matters addressed in the redacted documents withheld in this case.[4] The IG investigation found that the Administration did not have a "central database" to help immigrant parents reunite with their children, despite claims to the contrary. The audit found the government lacked a reliable way to track children and parents once they were separated, some children were stuck for more than three weeks in what was supposed to be three-day custody, and would-be asylum seekers were left with mixed messages about how to enter the country and avoid getting arrested. The IG report received widespread public attention,

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[2] Department of Homeland Security, *DHS, CBP/PIA-12-CBP Portal (E2) to ENFORCE/IDENT*, August, 2017: https://bit.ly/2Fv63dN.

[3] The report describes how Border Patrol uses the e3 Portal to collect and transmit data to EID related to law enforcement activities such as biographic, encounter, and biometric data for identification and verification of individuals encountered at the border. Government Accountability Office, Southwest Border Security, GAO-18-119, *Border Patrol is Deploying Surveillance Technologies but Needs to Improve Data Quality and Assess Effectiveness*, November 2017: https://bit.ly/2Km7YjN.

[4] Department of Homeland Security, Office of the Inspector General, OIG-18-84, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, September 27, 2018: https://bit.ly/2NhATFE.

demonstrating the high public interest in understanding the polices that led to the separation of thousands of children from their parents.

The records in this case should be compared closely with the information that is now in the public realm. Particular attention should be given to the April 23, 2018 memo released in this case, entitled "Increasing Prosecutions of Immigration Violations." The un-redacted version of this memo has been reported on and discussed extensively in the public realm, first by the Washington Post in April 2018,[5] and by major media outlets in October 2018.[6]

The existence of the April 23, 2018 memo garnered widespread attention because it contains information that appear to contradict statements made by Department of Homeland Security Secretary Kirstjen Nielsen.[7] The memo demonstrates that Nielsen personally signed off on the policy of separating parents and children to deter others from migrating to the United States. The memorandum was sent to Kirstjen Nielsen from Kevin McAleenan, the commissioner of U.S. Customs and Border Protection; L. Francis Cissna, the director of U.S. Citizenship and Immigration Services; and Thomas Homan, then the acting director of U.S. Immigrations and Customs Enforcement. The memo lays out three options for increasing illegal entry prosecutions, and recommends "Option 3," which would "pursue prosecution of all amenable adults who cross our border illegally, including those presenting with a family unit," as "the most effective method to achieve operational objectives and the Administration's goal to end 'catch and release." The memo states that Nielsen has the authority to "direct the separation of parents or legal guardians and minors held in immigration detention so that the parents or legal guardians can be prosecuted."

The document contains a redacted signature approving Option 3. The Department of Homeland Security has confirmed that the signature is Nielsen's, but the redaction was still made. Katie Waldman, a spokesperson for the Department of Homeland Security (DHS) said the memo simply states the premise that the agency has the legal authority to take an action.[8] "However, it did not direct a policy of family separation for the purposes of deterrence," said Waldman in a statement. "Conflating authority vs. actual policy based on a redacted memo provides a disservice to the public and does not show the full picture of considerations presented to the Secretary."

If the memorandum merely discusses the legal authority options under consideration by Secretary Nielsen, then the justification for the redactions made under Exemption 7 are even more tenuous. Again, CBP has failed to provide any reasonable justification this memo was compiled for law enforcement purposes, and that the disclosure of the withheld information would risk circumvention of the law.

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[5] Maria Sacchetti, *Top Homeland Security officials urge criminal prosecution of parents crossing border with children*, Washington Post, April 26, 2018: https://wapo.st/2KkcAae.

[6] Cora Currier, *Prosecuting Parents – and Separating Families – was Meant to Deter Migration, Signed Memo Confirms*, The Intercept, September 25, 2018: https://bit.ly/2Qc6vhP.

[7] Members of Congress have requested the un-redacted version of this memo. *See*, Hamas Aleazis and Adolfo Flores, *Lawmakers are Asking for a Copy of a Memo that DHS Secretary Nielsen Used to Justify Family Separations*, BuzzFeed, October 12, 2018:

[8] Adolfo Flores, *The Secretary Of Homeland Security Said There Was "No Policy Of Separating Families." A Memo Proves There Was*, BuzzFeed, September 27, 2018: https://bit.ly/2Q8Cbo1.

All of the withheld records that CBP claims contains law enforcement sensitive information in this case should be closely reviewed for improper redactions. The agency memos and emails contain mostly policy guidance and records that discuss CBP's response to the Justice Department's "Zero-Tolerance" policy, the White House Executive Order of June 20, 2018 halting the practice of family separation, and the June 26, 2018 federal court order to reunify children within 30 days. The records, therefore, were compiled in response to policy directives, not for any investigative purposes.

One memo, for example, dated June 27, 2018, is entitled "Interim Guidance on Preliminary Injunction in Ms. L. v. ICE, No. 18-428 (C.D. Cal. June 26, 2018)." This memo was not written for any law enforcement purposes, rather it is clear that it was developed as guidance to inform CBP Chiefs of next steps to take in response to the June 26th court order to reunify children. Another email in the documents, dated July 11, 2018, also discusses reunification efforts of family units following the June court order. Thus, any justification that it contains information that could be used to circumvent the law should be met with serious scrutiny.

CBP has failed to satisfy the threshold requirements for Exemption 7(E). CBP appears to contend that these records were compiled for law enforcement purposes simply because they describe CBP's options for detaining or processing individuals. Yet courts have found that "[a]t a minimum," defendants who invoke Exemption 7 need to provide "a description of the circumstances in which the records were compiled, the relevant law-enforcement activity for each, the nature of the incident or individual involved, and the perceived security risk or likely violation of the law." *AIC*, 2013 WL 3186061, at *21 (internal citations omitted); *see also Pratt*, 673 F.2d at 420. There is no indication that CBP would be able to meet this burden.

On appeal, we ask that the agency examine records that were withheld and immediately produce of all those that were improperly withheld. In addition, we ask that the agency order another search for responsive records. CBP did not conduct an adequate search as required by 5 U.S.C. §552(a)(3). An agency must complete a reasonable search for records responsive to a FOIA request. *Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), and must show that its search was reasonably calculated to uncover relevant documents. *Weinberg v. Dep't of Justice,* 745 F.2d 1476, 1485 (D.C. Cir. 1984). The discovery of a document that indicates the existence of other relevant documents creates an obligation for the agency to conduct a further search. *Ctr. For Nat'l Security Studies v. United States Dep't of Justice*, 215 F. Supp.2d 94, 110 (D.D.C. 2002) (citing Campbell v. United States Dep't of Justice, 164 F.3d 20, 28 (1998).

There are documents referenced in the released material that should have been included in the initial review, demonstrating that the initial search was not reasonably conducted to produce responsive documents. For example, the aforementioned April 23, 2017 memo cites a "legal analysis" in footnote 5, which should have been reviewed for release in this case. We ask that CBP include this document in the second review, as well as other responsive records.

If you find that this appeal is unclear in any way please do not hesitate to call me at (202) 332-6736 to see if I can clarify the request or otherwise expedite and simplify your efforts.

Thank you for your consideration.

Sincerely,

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