



State of California
Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

August 8, 2018

VIA ELECTRONIC DELIVERY AND CERTIFIED U.S. MAIL

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, D.C. 20201
Email: FOIARequest@HHS.gov

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528
Email: foia@hq.dhs.gov

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Email: EOIR.FOIARequests@usdoj.gov

RE: Freedom of Information Act Request Regarding Harms Caused by the “Zero-Tolerance”
Immigration Policy

Dear Secretary Azar, Secretary Nielsen, and Attorney General Sessions:

I write to request documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, related to the separation of families due to the Administration’s “zero-tolerance” border policy (the Policy). The Policy has resulted in the separation of thousands of children from their parents at the border, jeopardizing the safety and health of these children. Hundreds

of these children have not yet been reunited with their families, despite a court-ordered mandate. I write today seeking transparency regarding the decision-making and implementation of the Policy.

On or about April 6, 2018, the U.S. Department of Justice (DOJ) adopted the Policy for prosecution of immigration offences referred to DOJ by the U.S. Department of Homeland Security (DHS). As a result of the Policy, DHS separated family units, sending adults to detention facilities and transferring children to the care of the Office of Refugee Resettlement within the U.S. Department of Health & Human Services (HHS). On June 20, 2018, President Trump stated an intention to end the Policy by Executive Order 13841. For the months the Policy was in effect, the forcible separation from their families according to numerous medical experts, likely caused trauma and lasting harm to these children. Even with the issuance of the Executive Order, hundreds of these children are still separated from their families.

During a July 31, 2018, U.S. Senate Judiciary Committee hearing titled, "Oversight of Immigration Enforcement and Family Reunification Efforts," Commander Jonathan D. White of the U.S. Public Health Service Commissioned Corps testified that HHS was concerned about the effect of the Policy on child welfare and was uncertain of its ability to care for large numbers of detained children. Commander White testified that, "There's no question that separation of children from parents entails significant potential for traumatic psychological injury to the child."¹ In this same interaction, when Senator Blumenthal asked the government witness panel who thought the child separation policy was a success, not a single government witness raised his or her hand.

Pursuant to FOIA, I hereby request disclosure of records regarding the decision-making process behind the Policy and how it was determined that this policy should take effect given the concerns expressed by senior officials within the Administration for the welfare of the children who were separated from their parents. This letter describes: (1) the records requested and (2) our request for a fee waiver for production of these records.

¹ Senate Committee on the Judiciary, Hearing on "Oversight of Immigration Enforcement and Family Reunification Efforts," July 31, 2018, <https://www.judiciary.senate.gov/meetings/oversight-of-immigration-enforcement-and-family-reunification-efforts> at 03:16-03:18.

Request for Records

This request seeks all records, as described below, as that term has been defined by FOIA and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)). The time period of this request is from January 1, 2017 to the present.

1. All records related to the creation of this policy by HHS, DHS, DOJ, Office of Management and Budget (OMB), and /or the White House;
 - a. This request includes, but is not limited to consideration by HHS, DHS, DOJ, OMB, and the White House of the effects of the Policy on children's mental and physical wellbeing;
2. All records relating to HHS's determination of its ability to care for an influx of children detained as a result of the Policy;
3. All records concerning internal HHS meetings related to the Policy which were held with HHS employees only;
 - a. Request 3 includes but is not limited to any communications, meeting requests, or invitations to persons or groups, as well as meeting agendas, notes, or lists of those attending meetings or calls,
 - b. Request 3 includes but is not limited to records involving:
 - i. Former HHS Secretary Tom Price, HHS Secretary Alex M. Azar, Deputy Secretary Eric Hargan, Assistant Secretary ADM Brett P. Giroir, M.D., and Assistant Secretary Robert P. Kadlec, M.D.;
 - ii. HHS Administration for Children and Families employees, including but not limited to Acting Assistant Secretary Steven Wagner;
 - iii. Office of Refugee Resettlement employees, including but not limited to Director Scott Lloyd;
 - iv. Office of the Assistant Secretary for Preparedness and Response employees, including but not limited to Principal Deputy Assistant Secretary Kevin Yeskey, Deputy Assistant Secretary Chris Meekins, and Deputy Assistant Secretary Edward J. Gabriel; and
 - v. Members of the United States Public Health Service Commissioned Corps, including but not limited to Commander Jonathan White;
4. All records, concerning HHS meetings or calls related to the Policy which were held with HHS employees and individuals outside HHS;
 - a. Request 4 includes but is not limited to records involving any communications, meeting requests or invitations to persons or groups, as

well as meeting agendas, notes, or lists of those attending meetings or calls;

- b. Request 4 includes but is not limited to:
 - i. Employees of DHS and its agencies, including but not limited to Matthew T. Albence, Carla L. Provost, and Jennifer B. Higgins;
 - ii. Employees of DOJ and its agencies, including but not limited to Director James McHenry and Acting Deputy Director David Anderson;
 - iii. any group including outside entities and other governmental agencies;
 - iv. any member of Congress or representative of a member of Congress; and
 - v. any employee of the White House, including but not limited to Stephen Miller;
 - vi. any employee of OMB;
- 5. All records including but not limited to, memorandum(s), final decision memorandum(s), emails, meeting notices, summaries, agendas, or notes of any meeting or call, related to internal communications between HHS employees, including but not limited to former Secretary Tom Price, Secretary Alex M. Azar, Deputy Secretary Eric Hargan, Assistant Secretary ADM Brett P. Giroir, M.D., and Assistant Secretary Robert P. Kadlec, M.D. related to the Policy;
- 6. All records related to communications pertaining to the Policy between employees of HHS with any other person or group not employed by HHS not already identified in this request;
- 7. All records, including but not limited to, memorandum(s), final decision memorandum(s), emails, meeting notices, summaries, agendas, or notes of any meeting or call, related to internal communications between HHS employees, including but not limited to former Secretary Tom Price, Secretary Alex M. Azar, Deputy Secretary Eric Hargan, Assistant Secretary ADM Brett P. Giroir, M.D., and Assistant Secretary Robert P. Kadlec, M.D., related to the Policy;
- 8. All records, including but not limited to, memorandum(s), final decision memorandum(s), emails, meeting notices, summaries, agendas, or notes of any meeting or call, related to internal communications between DHS employees, including but not limited to Secretary Kirstjen Nielsen, Matthew T. Albence, Carla L. Provost, and Jennifer B. Higgins, related to the Policy;

9. All records, including but not limited to, memorandum(s), final decision memorandum(s), emails, meeting notices, summaries, agendas, or notes of any meeting or call, related to internal communications between DOJ employees, including but not limited to Attorney General Jeff Sessions, Director James McHenry, and Acting Deputy Director David Anderson related to the Policy; and
10. Organization chart(s) for HHS, DHS, DOJ, OMB, and the White House from January 20, 2017 to the date of the response to this request, including all employees who participated in the development and/or implementation of the Policy.

Please provide these records in a timely manner, on a rolling basis, and in a readily-accessible, electronic format, either in “.pdf,” or native form for Excel spreadsheets. *See* 5 U.S.C. § 552(a)(3)(B). If HHS, DHS, or DOJ has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, then please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location), (ii) the justification for the destruction or claimed exemption(s), and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A).

This request includes any records in the custody, control, or possession of HHS, DHS, and DOJ, inclusive of all sub-agencies and all respective subdivisions of each agency. Nothing in these requests should be interpreted to be seeking personally identifiable information such as names or addresses. Any record responsive to a request that contains personally identifiable information should be redacted accordingly.

I believe that the documents sought are of great public interest and not exempt from required disclosure under FOIA. Please forward this request to all agencies within HHS, DHS, and DOJ, as well as any other federal agencies that may be in possession of the requested documents. In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, I request that you disclose these documents as a matter of agency discretion.

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Please send all requested materials to my attention, at the address provided above, within 20 business days as required by FOIA. Should you have any questions or concerns about this request, please contact Neli Palma, Deputy Attorney General at (916) 210-7522. In addition, our request for a fee waiver is available in appendix A.

Sincerely,

A handwritten signature in blue ink, appearing to read "Xavier Becerra", with a large, stylized loop at the end.

XAVIER BECERRA
California Attorney General

cc: Michael Marquis
Nicole Barksdale-Perry
Joseph R. Schaaf

Appendix A:

California requests a waiver of searching and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). HHS, DHS, and DOJ have incorporated this requirement in their regulations for responding to FOIA requests. 45 C.F.R. § 5.54; 28 C.F.R. § 16.10(k); 6 C.F.R. § 5.11(k). Under the criteria set forth in each department's regulations, such a waiver is appropriate here, as explained below.

"Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated." 45 C.F.R. § 5.54(b)(1); see also 28 C.F.R. § 16.10(k)(2)(i) and 6 C.F.R. § 5.11(k)(2)(i).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern the decision of HHS, DHS, and DOJ to implement the Policy. These are direct and clear actions by the federal government that have a direct impact on state and local governments.

"Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities." 45 C.F.R. § 5.54(b)(2); see also 28 C.F.R. § 16.10(k)(2)(ii) and 6 C.F.R. § 5.11(k)(2)(ii).

This disclosure would be likely to contribute significantly to the public understanding of the federal government's decision implement the Policy, including any and all deliberations related to the Policy's effects on children's health. This information is not already in the public domain. See 45 C.F.R. § 5.54(b)(2)(i), 28 C.F.R. § 16.10(k)(2)(ii)(A), and 6 C.F.R. § 5.11(k)(2)(ii)(A).

Moreover, the disclosure will contribute to the understanding of a broad audience of persons interested in the subject. See 45 C.F.R. § 5.54(b)(2)(iii), 28 C.F.R. § 16.10(k)(2)(ii)(B), and 6 C.F.R. § 5.11(k)(2)(iii). There is no question that the treatment of children forcibly separated from their families is a matter of significant public interest. I am the chief law officer for the State of California and its more than 39 million residents, and I have a role in protecting the health and safety of all the state's residents. My office engages regularly with the public and serves as a source of information to promote the public's understanding through speaking engagements, press releases, and other social media. These public outreach actions, coupled with my office's expertise in both administrative and civil justice law, make my office well suited to disseminate more broadly any notable records disclosed as part of this request, which I plan to do.

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“The disclosure must not be primarily in the commercial interest of the requester.” 45 C.F.R. § 5.54(b)(3); see also 28 C.F.R. § 16.10(k)(2)(iii) and 6 C.F.R. § 5.11(k)(1)(ii).

I am a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. *See* Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist me in representing the more than 39 million people of California. Disclosure of the documents sought “is likely to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.