

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 18-2845

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
200 Independence Avenue SW
Washington, DC 20201

and

ADMINISTRATION FOR CHILDREN &
FAMILIES,
330 C Street SW
Washington, DC 20201

and

OFFICE OF INSPECTOR GENERAL OF THE
U.S. DEPARTMENT OF HEALTH & HUMAN
SERVICES
330 Independence Avenue SW
Washington, DC 20201

Defendants.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Health and Human Services, the Administration for Children & Families, and the Office of Inspector General of the U.S. Department of Health & Human Services under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants have failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agencies from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government

through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Health and Human Services (HHS) is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of the records that American Oversight seeks.

7. Defendant Administration for Children & Families (ACF) is a division of HHS and is also headquartered in Washington, DC. ACF has possession, custody, and control of the records that American Oversight seeks.

8. Defendant Office of Inspector General of the U.S. Department of Health & Human Services (OIG) is an office within HHS and is also headquartered in Washington, DC. OIG has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

Capacity Report Update FOIA

9. On June 20, 2018, American Oversight submitted a FOIA request to ACF seeking access to the following records:

Copies of all “Capacity Report Update” spreadsheets from January 2017 through the date of the search produced in native Excel format.

10. ACF assigned the Capacity Update Report FOIA tracking number 18-F-0265.

DNA Testing FOIA

11. On October 18, 2018, American Oversight submitted a FOIA request to HHS and ACF seeking access to the following records:

1. Records sufficient to identify any procedures, standards, guidance, policies, and rules with regard to conducting DNA tests of children

and parents separated from each other by immigration authorities, including the storage or disposal of data gathered from that testing. This search should include:

- a. Any final legal guidance or analyses produced by HHS and/or ACF regarding the decision to use DNA testing to reunite separated migrant families;
 - b. Records sufficient to show the office and program within HHS and/or ACF responsible for conducting DNA testing of separated migrant families;
 - c. Records reflecting any auditing and compliance mechanisms HHS and/or ACF have in place to ensure that the testing is in accordance with applicable laws and policies;
 - d. Records reflecting all guidance or standards for obtaining consent for DNA testing from migrant children in the care of HHS/ACF or adult family members; and
 - e. Records reflecting all plans for storage or destruction of genetic material & data obtained through DNA testing of separated families.
2. Records sufficient to show the names of the laboratory or laboratories HHS and/or ACF are working with to conduct the DNA testing, including contracts for the DNA testing of separated migrant families.
 3. Records sufficient to show the types of genetic markers (e.g., STRs or SNPs) that these laboratories tested for and whether the laboratories used the CODIS STR panel to generate DNA fingerprints.
 4. Records sufficient to show the cost of DNA testing of separated migrant families, and the source of the funds used for this testing, including any reassignment of funds to cover the cost of the testing.
 5. All records reflecting any agreement to share information from DNA testing of separated migrant families with any entity outside of HHS, including the Federal Bureau of Investigation, any other part of the Department of Justice, any entity within the Department of Homeland Security, or the Department of State, including any memorandum of understanding with any other federal agency regarding the sharing of this information.
 6. Records reflecting any procedure to reunite family members who cannot support their claims of relationship with DNA tests.

7. All documents produced in response to the July 13, 2018 letter from Reps. Jackie Speier and Karen Bass to Secretary Azar regarding transparency in HHS's use of DNA testing to reunite separated families.¹

The request sought all responsive records from May 1, 2018, to the date of the search.

Detention Facility Conditions FOIA

12. Also on October 18, 2018, American Oversight submitted a FOIA request to ACF seeking access to the following records:

1. Records sufficient to show the number of, age, sex, length of detention, and reason for placement of minors in the care of the Office of Refugee Resettlement (ORR) housed at the Shenandoah Valley Detention Center, the Yolo County Juvenile Detention Facility, the Northern Virginia Juvenile Detention Center, and any other "secure placement" facility for unaccompanied alien children (UACs) between April 1, 2017, and the date of search.
2. Records reflecting any complaints of physical or emotional abuse at any of the three facilities listed in Part 1 of this request or any other "secure placement" facility that ORR has received since October 1, 2008.
3. Records sufficient to show any policies or best practices that ORR follows to move UACs out of secure placement and into residential settings.
4. Any records responsive to Sen. Mark Warner and Sen. Tim Kaine's June 22, 2018 letter to ORR.²
5. All photographs, videos or audio recordings taken in any inspections by ORR of any facility holding UACs between April 1, 2018 and the date of search.
6. All email chains including any photographs, videos, or audio recordings of facilities housing UACs sent by or to any political appointee—including where any political appointee is copied

¹ A copy of the July 13, 2018 letter from Representatives Speier and Bass to Secretary Azar is attached hereto as Exhibit A.

² A copy of the June 22, 2018 letter from Senators Warner and Kaine to ACF's Acting Assistant Secretary Steven Wagner is attached hereto as Exhibit B.

(cc'd) or blind copied (bcc'd) on any email—in the head office of ORR between January 1, 2017, and the date of search.

13. ACF assigned the Detention Facility Conditions FOIA request tracking number 19-F-0034.

OIG Inspections FOIA

14. Also on October 18, 2018, American Oversight submitted a FOIA request to OIG seeking access to the following records:

All photographs, videos, or audio recordings taken in any inspections by the Office of the Inspector General of any facility holding unaccompanied alien children (UACs) between April 1, 2018, and the date of the search.

15. OIG assigned the OIG Inspections FOIA request tracking number OIG-19-0083-KS.

Exhaustion of Administrative Remedies

16. As of the date of this Complaint, HHS, ACF, and OIG have failed to (a) notify American Oversight of any determination regarding American Oversight's FOIA requests, including the full scope of any responsive records the agencies intend to produce or withhold and the reasons for any withholdings; or (b) produce all of the requested records or demonstrate that the requested records are lawfully exempt from production.

17. Through Defendants' failure to make determinations as to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

18. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

19. American Oversight properly requested records within the possession, custody, and control of Defendants.

20. Defendants are agencies subject to and within the meaning of FOIA and must therefore make reasonable efforts to search for requested records.

21. Defendants have failed to promptly and adequately review agency records for the purpose of locating those records which are responsive to American Oversight's FOIA requests.

22. Defendants' failure to conduct adequate searches for responsive records violates FOIA.

23. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to conduct adequate searches for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

24. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

25. American Oversight properly requested records within the possession, custody, and control of Defendants.

26. Defendants are agencies subject to and within the meaning of FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

27. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

28. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

29. Defendants' failure to provide all non-exempt responsive records violates FOIA.

30. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests identified in this Complaint;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: December 4, 2018

Respectfully submitted,

/s/ Joseph F. Yenouskas

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