

Exhibit 4



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March 30, 2020

Via Email and FedEx

Privacy Office
Attn: FOIA Appeals
U.S. Department of Homeland Security
245 Murray Lane, SW, Mail Stop 0655
Washington, DC 20528-0655
FOIA@hq.dhs.gov

Re: NPR/DHS: FOIA Appeal – Request No. 2020-HQFO-00296

Dear FOIA Appeals Officer:

This firm represents National Public Radio, Inc. and journalist Tom Dreisbach (together, “NPR”) with respect to the above-referenced Freedom of Information Act (“FOIA”) request, which was submitted to the U.S. Department of Homeland Security (“DHS”) on December 5, 2019. NPR’s FOIA request is attached as Exhibit A.

Pursuant to 5 U.S.C. § 552 and 6 CFR § 5.8, NPR appeals DHS’s March 16, 2020 response to that request. A copy of the agency’s response is attached as Exhibit B. As set forth below, NPR asks that you reverse DHS’s initial determination and instruct DHS to produce, without delay, copies of the records responsive to NPR’s request.

Background

DHS’s Office of Civil Rights and Civil Liberties (“CRCL”) is responsible for “review[ing] and investigat[ing] civil rights and civil liberties complaints made by the public regarding [DHS] policies and activities.”¹ CRCL also conducts “intensive site visits” to “ICE detention facilities” and produces reports based on those visits.² DHS has released copies of

¹ See <https://www.dhs.gov/file-civil-rights-complaint>.

² See <https://www.dhs.gov/publication/homeland-security-advisory-council-report-subcommittee-privatized-immigration-detention>.

March 30, 2020

Page 2

such reports to NPR in response to previous FOIA requests. *See, e.g.*, FOIA Request No. 2018-HQFO-01360 (resulting in the release of records relating to a November 2017 review and investigation of Adelanto ICE Processing Center a/k/a the Adelanto Correctional Facility).

On December 5, 2019, NPR submitted a FOIA request to DHS seeking “all CRCL inspection and investigative reports from CRCL examinations of immigration detention facilities under the auspices of U.S. Immigration and Customs Enforcement (ICE) from January 1, 2014 to December 5, 2019.” Ex. A at 1. NPR stated that its request “specifically excludes” certain “personal identifying information about employees and detainees of immigration detention facilities” and “accepts redactions withholding such information.” *Id.*

On March 16, 2020, DHS denied NPR’s request. Ex. B at 1. DHS stated that it had identified 1,076 pages of “documents responsive to [the] request,” but that it was withholding those records in full under FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) & (b)(6). *Id.*

As to Exemption 5, DHS stated that all of “the responsive documents qualify for protection under the Deliberative Process Privilege.” *Id.* As to Exemption 6, DHS stated that “[t]he privacy interests of the individuals in the records [NPR] requested outweigh any minimal public interest in disclosure of the information.” *Id.*

NPR now timely appeals DHS’s response, which fails to comply with the agency’s obligations under FOIA. DHS should be instructed to produce complete copies of all responsive records promptly. Alternatively, and at a minimum, the agency should be directed to produce narrowly redacted copies of the records expeditiously.

Argument

FOIA strongly favors full, timely disclosure of records and information, consistent with certain limited bases for refusing such disclosure. 5 U.S.C. § 552. As the Supreme Court has noted, FOIA “was enacted to facilitate public access to Government documents,” and specifically was “designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citations and internal marks omitted). FOIA therefore creates a “strong presumption in favor of disclosure” and squarely “places the burden on the agency to justify the withholding of any requested documents.” *Id.*

Because its “basic policy . . . is in favor of disclosure,” FOIA “is to be *broadly* construed in favor of disclosure, and, unless requested material in the possession of a federal agency falls within one of the statutory exemptions structured to protect specified confidentiality and privacy interests, it must be made available on demand to any member of the general public.” *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982) (emphasis added and citations omitted). Those exemptions, by contrast, “are to be *narrowly* construed with all doubts resolved in favor of disclosure.” *Id.* (emphasis added).

The amendments to FOIA enacted in the FOIA Improvement Act of 2016 further

March 30, 2020

Page 3

strengthen this well-settled principle of openness. The statute now requires agencies to administer FOIA with a clear presumption of transparency and permits withholding only where disclosure would result in *reasonably foreseeable* harm or where disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i) (emphasis added). None of those circumstances is present here. DHS's response to NPR's request thus fails to meet its threshold obligations under FOIA.

I. EXEMPTION 5 DOES NOT PREVENT DISCLOSURE OF ANY RESPONSIVE RECORDS.

DHS has improperly withheld all of the records responsive to NPR's request under Exemption 5, which narrowly authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts recognize that this generally includes materials protected under the attorney-client privilege, the attorney work-product privilege, or the deliberative process privilege. *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 676 (D.C. Cir. 1981).

DHS relies here on the deliberative process privilege. Ex. B at 1. That privilege, however, extends only to a narrow set of records that are both predecisional and deliberative. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A record is "predecisional" if "it was generated before the adoption of an agency policy" and "deliberative" if "it reflects the give-and-take of the consultative process." *Id.* Communications that occur after a policy has already been settled upon, that constitute statements of policy or final opinions that have the force of law, or that explain actions that an agency has already taken are *not* subject to Exemption 5. *Taxation With Representation Fund*, 646 F.2d at 677.

As the D.C. Circuit has explained, if the withheld material "could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable." *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Moreover, "agency communications containing purely factual material are generally *not* protected by Exemption (b)(5)." *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (emphasis added). This means that "Exemption 5 disputes can often be resolved by the simple test that factual material must be disclosed but advice and recommendations may be withheld." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988).

All together, these settled FOIA principles dictate that DHS may not withhold any responsive record (or portion thereof) unless it actually is part of a deliberative process. Moreover, DHS may not withhold under Exemption 5 any portion of a responsive record setting out "purely factual matters." DHS's initial response falls far short of establishing that the CRCL reports are part of the agency's deliberative process or that the agency is not improperly withholding "purely factual" material contained within those critically important reports.

March 30, 2020

Page 4

II. EXEMPTION 6 DOES NOT PREVENT DISCLOSURE OF ANY RESPONSIVE RECORDS.

DHS's refusal to produce responsive records to NPR because they purportedly implicate "privacy interests of the individuals in the records" also is contrary to FOIA. Exemption 6 permits agencies to withhold "personnel and medical files and similar files," but only when their disclosure "would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Thus, "agencies and reviewing courts" must "balance the privacy interests that would be compromised by disclosure against the public interest in the release of the requested information." *100Reporters LLC v. Dep't of Justice*, 248 F. Supp. 3d 115, 158 (D.D.C. 2017) (quoting *Beck v. Dep't of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993)).

Here, DHS does not appear to have engaged in any such balancing, because the public interest in these records clearly outweighs any risk of harm to personal privacy from their release. ICE is in charge of the care of tens of thousands of detainees every day. Yet as NPR and others have reported, government inspectors have found inadequate care and treatment of detainees in immigration detention.³ Moreover, DHS's Office of Inspector General reported that ICE's inspections "do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years."⁴ The responsive records, reflecting CRCL's own inspections, would help the public understand the true scope of this problem and DHS's efforts to mitigate it. *See, e.g., News-Press v. DHS*, 489 F.3d 1173, 1178 (11th Cir. 2007) (rejecting Exemption 6 claim despite "the privacy interests at stake" where "the magnitude" of the public interest in the requested records "is potentially enormous").

DHS does not and cannot carry its burden to withhold these records under Exemption 6. Accordingly, to comply with federal law, the agency should be instructed to release the requested records, in full, without further delay.

III. DHS IMPROPERLY REFUSED TO PRODUCE NON-EXEMPT PORTIONS OF RESPONSIVE RECORDS.

Finally, even if records responsive to NPR's request do contain some information that may be properly withheld, FOIA nevertheless requires that "[a]ny reasonably segregable portion" of the records be produced "after deletion of the portions which are exempt." 5 U.S.C. § 552(b). DHS's attempt to withhold these responsive records in full merely because they *may*

³ *See, e.g.,* <https://www.npr.org/2020/01/15/794660949/despite-findings-of-negligent-care-ice-to-expand-troubled-calif-detention-center>;
<https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html>;
<https://money.cnn.com/2018/06/18/media/media-border-surge-separation-policy/index.html>;
<https://theintercept.com/2018/07/27/immigrant-detention-suicides-ice-corecivic/>;
<http://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html>.

⁴ *See* <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

March 30, 2020

Page 5

contain *some* exempt information fails to satisfy this basic statutory requirement.

To comply with FOIA, therefore, DHS must produce – at a minimum – all reasonably segregable non-exempt portions of the records it has identified as responsive to NPR’s request.

* * *

We look forward to your prompt response to this appeal within 20 working days, and in any event no later than the close of business on April 27, 2020. 5 U.S.C. § 552(a)(6)(A)(ii).

If you would like to discuss this matter, I invite you to call. Please otherwise communicate with us via email at mishkinm@ballardspahr.com (with copies by regular mail). Thank you for your anticipated cooperation.

Sincerely yours,

BALLARD SPAHR LLP



Maxwell S. Mishkin

cc: Tom Dreisbach (via email)

Exhibit A



Tom Dreisbach
c/o NPR West
9909 Jefferson Blvd
Culver City, CA 90232
tdreisbach@npr.org
310-815-4376

December 5, 2019

U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655
Phone: 202-343-1743 or 866-431-0486
Fax: 202-343-4011
E-mail: foia@hq.dhs.gov

To Whom It May Concern:

I am a reporter and producer with National Public Radio (“NPR News”), and I am writing to request the following records from the Department of Homeland Security (“DHS”) Office for Civil Rights and Civil Liberties (“CRCL”) under the Freedom of Information Act:

I. Record(s) Requested

1. A copy of all CRCL inspection and investigative reports from CRCL examinations of immigration detention facilities under the auspices of U.S. Immigration and Customs Enforcement (ICE) from January 1, 2014 to December 5, 2019.

As the FOIA requires, please release all reasonably segregable nonexempt portions of these documents. To the extent these documents contain certain personal identifying information about employees and detainees of immigration detention facilities (such as names, dates of birth, employee numbers, or Alien Registration Numbers), this request specifically excludes such information from its scope and accepts redactions withholding such information.

I am requesting electronic copies of these records, to be delivered by email, if possible. If that is not possible, please contact me to discuss additional options for disclosure.

II. Relevant Background Regarding Requested Records

According to the DHS website, “The Office for Civil Rights and Civil Liberties (CRCL) reviews and investigates civil rights and civil liberties complaints made by the public regarding U.S. Department of Homeland Security (DHS) policies and activities. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL reviews and assesses allegations involving a range of alleged civil rights and civil liberties abuses”.¹

According to a December 2016 report by the Homeland Security Advisory Council (“HSAC”), the CRCL also conducts a review of such complaints, and “Based on its review of complaints and further inquiry, it makes recommendations to the Department for changed practices.”²

The HSAC report also states that CRCL, “schedules 10-15 intensive site visits each year to ICE detention facilities, led by experienced CRCL officers and also involving subject matter experts.”

For example, from November 13-14, 2017, CRCL conducted a “progress review and investigation” at the Adelanto ICE Processing Center (also known as the Adelanto Correctional Facility). The reports from that review have previously been released to me in response to FOIA request 2018-HQFO-01360. (That request was also granted expedited processing and a fee waiver.)

With this new FOIA request, I am seeking copies of all inspection and/or investigative reports from CRCL examinations of all immigration detention facilities under the auspices of U.S. Immigration and Customs Enforcement (ICE) from Jan. 1, 2014 to Dec. 5, 2019.

III. Request For Expedited Processing And Fee Waiver

I am requesting expedited processing for this records request and a waiver for all applicable fees.

¹ <https://www.dhs.gov/file-civil-rights-complaint>

² “Report of the Subcommittee on Privatized Immigration Detention Facilities,” 1 Dec. 2016
<https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>

Under the FOIA, a request for records may be expedited if there is, “An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.”³

This request meets that requirement for the following reasons:

1. The actual or alleged government activity involves the treatment of detainees in immigration detention and detainees and government inspectors have found inadequate care and treatment that could require urgent remedy by the federal government to prevent further misconduct. For example:
 - a. Conditions at facilities in the ICE detention system and treatment of detainees in that system have received considerable media attention in recent days.^{4 5 6 7} The disclosure of additional information about conditions and treatment at ICE detention facilities would further help inform the public about this issue of urgent public concern.
 - b. The treatment of detainees in ICE custody is also an urgent issue identified the Office of Inspector General for the Department of Homeland Security. A recent report by that office found that, “Although ICE’s inspections, follow-up processes, and onsite monitoring of facilities help correct some deficiencies, they do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years.”⁸ Disclosing the inspection reports from CRCL would help the public better understand the ways in which ICE maintains standards of detention.

³ 6 C.F.R. § 5.5(e)(1) ; *see also* 5 U.S.C. § 552(a)(6)(E)(i)(I) (expedited processing of requests for records warranted “in cases in which the person requesting the records demonstrates a compelling need”); *id.* § 552(a)(6)(E)(v)(II) (defining “compelling need” to be “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity”).

⁴ The New York Times, July 2, 2019, “Squalid Conditions at Border Detention Centers, Government Report Finds,” <https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html>

⁵ CNN, June 18, 2018, “The media surges to the border as family separation crisis grows,” <https://money.cnn.com/2018/06/18/media/media-border-surge-separation-policy/index.html>

⁶ The Intercept, July 27, 2018, “ICE DETAINEE DIAGNOSED WITH SCHIZOPHRENIA SPENT 21 DAYS IN SOLITARY CONFINEMENT, THEN TOOK HIS OWN LIFE,” <https://theintercept.com/2018/07/27/immigrant-detention-suicides-ice-corecivic/>

⁷ Los Angeles Times, Aug. 8, 2017, “‘We don't feel OK here': Detainee deaths, suicide attempts and hunger strikes plague California immigration facility,” <http://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html>

⁸ <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>

- c. ICE is in charge of the care of tens of thousands of detainees every day, and is required to maintain certain standards of detention under federal law. According data from the federal government, the Department of Homeland Security detained 352,880 non-citizens in Fiscal Year 2016⁹, and DHS proposed in its FY 2018 budget an average daily population (ADP) of ICE detainees of 51,379.¹⁰ Given the allegations of mistreatment in federal court and the media, and the high number of detainees, there exists an urgent need to inform the public about whether national standards of detention have been being properly upheld in the past, are currently being upheld, and will be upheld going forward.

2. I am a member of the news media primarily engaged in disseminating information.¹¹

- a. As a reporter and producer with NPR News, I am primarily engaged in disseminating information to the American public through reporting both online and via broadcast outlets.¹² NPR News is a non-profit, non-commercial news network that is chiefly engaged in journalism in the public interest, and I will use this information solely for the purpose of informing the public about the operations of the federal government.¹³

For the above stated reasons, I also request a waiver of all fees for this request.

Disclosure of the requested information is in the public interest, because, as indicated above, it relates to an issue of urgent public concern: conditions at facilities in the ICE detention system.

In the event that fees are not waived, I am willing to pay fees for this request up to a maximum of \$50. If you estimate that the fees will exceed this limit, please inform me before processing my request.

If you have any questions regarding this request, please contact me by phone at 310-815-4376 or by email at tdreisbach@npr.org. I look forward to receiving your response within the twenty day statutory time period.

⁹ Congressional Research Service, June, 22, 2018, "A Primer on U.S. Immigration Policy" (Accessed at: <https://fas.org/sgp/crs/homesecc/R45020.pdf>)

¹⁰

https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf

¹¹ See, e.g., *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 298 (D.D.C. 2017) (requirement met where "information dissemination [is] the main [and not merely an incidental] activity of the requestor").

¹² <https://www.npr.org/people/349305392/tom-dreisbach>

¹³ <https://www.npr.org/about-npr/192827079/overview-and-history>

Thank you for your consideration of this request.

Best regards,

Tom Dreisbach
NPR News

Exhibit B



**Homeland
Security**

Privacy Office, Mail Stop 0655

March 16, 2020

SENT VIA E-MAIL TO: tdreisbach@npr.org

Tom Dreisbach
NPR
9909 Jefferson Blvd
Culver City, CA 90232

Re: **2020-HQFO-00296**

Dear Mr. Dreisbach:

This is the electronic final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated December 5, 2019, and received by this office on December 5, 2019. You are seeking all DHS CRCL on-site inspection reports of immigration detention facilities from Jan. 1, 2017 to Dec. 31, 2019 per your amended request dated December 20, 2019.

A search of the Office of Civil Rights and Civil Liberties (CRCL) for documents responsive to your request produced a total of 1,076 pages. These records are withheld in their entirety pursuant to Title 5 U.S.C. § 552: (b)(5) and (b)(6), FOIA Exemptions 5 and 6.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that the responsive documents qualify for protection under the Deliberative Process Privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

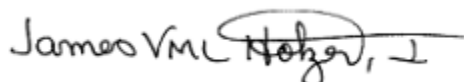
You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter, to: Privacy Office, Attn: FOIA Appeals, U.S. Department of Homeland Security, 245 Murray Lane, SW, Mail Stop 0655, Washington, D.C. 20528-0655, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS FOIA regulations are available at www.dhs.gov/foia.

Provisions of FOIA allow DHS to charge for processing fees, up to \$25, unless you seek a waiver of fees. In this instance, because the cost is below the \$25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, please contact the analyst below who processed your request and refer to **2017-HQFO-00271**. You may send an e-mail to foia@hq.dhs.gov, call 202-343-1743 or toll free 1-866-431-0486, or you may contact our FOIA Public Liaison in the same manner.

Additionally, you have a right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in black ink that reads "James V.L.M. Holzer, J." with a stylized flourish at the end.

James V.L.M. Holzer
Deputy Chief FOIA Officer