



U.S. Department of Homeland Security
FOIA Appeals
245 Murray Lane, SW, Mail Stop 0655
Washington, DC 20528-0655

U.S. Customs and Border Protection
FOIA Appeals, Policy and Litigation Branch
90 K Street NE
Washington, DC 20229

July 10, 2019

Re: Appeal of Constructive Denial of Requests for Responsive Records and Fee Waiver for FOIA Request 2019-HQFO-00291; CBP-2019-037858; CBP-2019-025266

Dear Appeals Officers:

We write pursuant to the Freedom of Information Act and DHS's implementing regulations to appeal the agency's constructive denial of a request for records (the Request) submitted by the Democracy Forward Foundation and the Center for American Progress (the Requestors) on January 17, 2019, and assigned DHS tracking number 2019-HQFO-00291 and CBP tracking numbers CBP-2019-25266 and CBP-2019-037858. We are also appealing the constructive denial of a fee waiver for CBP-2019-037858, pursuant to 5 U.S.C. § 552(a)(4)(A).

I. Background

On December 8, 2018, Jakelin Amei Rosmery Caal Maquin, a 7-year-old girl from Guatemala, died while in the custody of U.S. Customs and Border Protection (CBP) agents. Just over two weeks later, on December 24, 2018, Felipe Gómez Alonzo, an 8-year-old boy also from Guatemala, died while in the custody of CBP agents. These two deaths—the first in at least a decade—have been followed by additional deaths of children in CBP custody or shortly after their release from CBP custody. Each death has been referred for investigation by the Office of the Inspector General of the Department of Homeland Security as well as by the Office of Professional Responsibility within CBP. Additional reviews—either of the deaths themselves, circumstances surrounding the deaths, or policy changes that should be taken to prevent future deaths—have likely been conducted by these and other offices within DHS and CBP, including by the Office for Civil Rights and Civil Liberties.

To better understand, and explain to the public, the circumstances surrounding the deaths of Jakelin Amei Rosmery Caal Maquin and Felipe Gómez Alonzo, and the dangerous conditions in which children continue to be held in CBP custody, Democracy Forward Foundation and the



Center for American Progress requested the production of the following within twenty (20) business days on January 17, 2019:

1. *All video or audio recordings documenting CBP interactions with Jakelin Amei Rosmery Caal Maquin and Felipe Gómez Alonzo at the point of arrest, inspection, processing, or transport, whether obtained through the Centralized Video Surveillance System (“CAVSS”) or another means;*
2. *All video surveillance footage from cameras stationed at any of the various CBP facilities in which the children were detained or held, even temporarily, while in CBP custody;*
3. *All medical records, including any notes, charts, or discharge summaries detailing medical treatment or health screenings provided to Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo while they were in CBP custody and retained by CBP;*
4. *All medical records concerning Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo, including discharge paperwork and post-discharge care instructions, provided by hospital staff to CBP officials;*
5. *All records provided to hospital staff by CBP officials describing or making assurances concerning the post-discharge care that would be made available to Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo;*
6. *All records provided to hospital staff by CBP officials describing the locations and conditions to which Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo would return;*
7. *Autopsy reports for Jakelin Amei Rosmery Caal Maquin and Felipe Gómez Alonzo;*
8. *All forms generated in the course of the arrest, detention, transfer, or medical treatment of Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo;*
9. *All memos or reports containing post-incident assessments of CBP conduct related to Jakelin Amei Rosmery Caal Maquin or Felipe Gómez Alonzo;*
10. *All records created on or after January 20, 2017 related to health emergencies involving minor children that occurred within 72 hours of their entry into CBP custody;*
11. *All records created on or after January 20, 2017 related to incidents, practices, guidance, complaints, or problems regarding medical treatment, health screenings, food, water, welfare checks, overcrowding, temperature, and all other conditions of confinement or transport for undocumented persons apprehended and/or detained at or near the Antelope Wells port of entry and/or Camp Bounds;*
12. *All records created on or after January 20, 2017 related to prior incidents, practices, guidance, complaints, or problems regarding medical treatment, health screenings, food, water, welfare checks, overcrowding, temperature, and all other conditions of confinement or transport for undocumented persons apprehended at or near the Paso del Norte port of entry and/or detained at the El Paso Border Station and/or Alamogordo Station; and*
13. *All records created on or after January 20, 2017 related to services for persons whose first language is Q’eqchi’, Chuj, or another Mayan language, including translation and medical care, and/or related to health problems involving persons whose first language is Q’eqchi’, Chuj, or another Mayan language.*

For Requests Nos. 1-9, we requested a search for records created between December 1, 2018 and the date on which the search is completed. For Requests Nos. 10-13, we requested a search for records created between January 20, 2017 and the date on which the search is completed.

II. The Constructive Denial of Requested Records

On January 22, 2019, DHS acknowledged receipt of the FOIA Request and assigned it tracking number 2018-HQFO-00291. DHS referred the Request to the FOIA office for CBP and appears to have marked the request closed on that same date. On January 31, 2019, CBP acknowledged that it received the FOIA request on January 30, 2019 and assigned it tracking number CBP-2019-025266. Following submission of a status update letter, CBP assigned a second tracking number, CBP-2019-037858. According to the FOIA Online case tracker, as of the date on which this appeal was submitted CBP-2019-025266 was listed as “Under Agency Review” and in the “Evaluation” phase and CBP-2019-037858 was listed as “Under Agency Review” and in the “Assignment” phase.

It has now been 118 business days since the Request was acknowledged as received by DHS and 112 days since the Request was acknowledged as received by CBP. In this time, DHS and CBP have neither provided a meaningful response, nor offered a reasonable explanation for the lengthy delay. Repeated efforts by the Requestors to contact CBP for an update on the status of the request have gone unanswered. FOIA requires an agency to respond to a request for records within twenty (20) business days, 5 U.S.C. § 552(a)(6)(A)(i). Nor have DHS and CBP asserted that “unusual circumstances” exist to justify their refusal to respond to the Request within the time period required by the FOIA, which, in any event, would have earned them only an additional ten (10) business days. *Id.* at § 552(a)(6)(B)(i). Accordingly, DHS and CBP’s responses to the Request are woefully overdue and the Requestors are “deemed to have exhausted [their] administrative remedies.” *See id.* at § 552(a)(6)(C)(i). The constructive denial should be reversed and responsive documents should be produced forthwith.

In an effort to resolve this matter without resort to litigation, however, the Requestors submit this administrative appeal and request a reply within twenty (20) business days to this appeal and the underlying Request. *See id.* at § 552(a)(6)(A)(ii).

III. The Constructive Denial of the Fee Waiver Request

Along with the original Request, the Requestors asked for a waiver of document search, review, and duplication fees. While the FOIA Online case tracker lists the Fee Category for CBP-2019-025266 as “Media,” it lists the Fee Category for CBP-2019-037858 as “TBD.” For the same reason as the substantive request for records, this failure to resolve the Requestors’ request for a fee waiver after several months constitutes a constructive denial of the request included in CBP-2019-037858.

Fees should be waived if disclosure is 1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and 2) not

primarily in the commercial interest of the requester. See 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

Disclosure of the requested records to the Requestors is in the public interest here because the information requested is not already publicly available and will reveal “meaningfully informative” information about the “operations or activities of the federal government.” 6 C.F.R. § 5.11(k)(2)(ii). Furthermore, news accounts—such as those cited above and in the Request—underscore the substantial public interest in the records sought through this request. 5 U.S.C. § 552(a)(4)(A)(iii). Given the widespread media attention pertaining to the deaths of these two children, and to the treatment of children more broadly in CBP custody, the records sought will contribute significantly to public understanding of an issue of profound public importance.

Moreover, the Requestors each qualify as a “representative of the news media” because each organization analyzes raw information, uses its editorial skills and expert analysis to transform primary source information into distinct work products such as reports, issue briefs, and columns, and “distributes the resulting work to the public” by disseminating the work to a large audience. *Id.* at § 552(a)(4)(A)(ii)(II); *see also Nat’l Sec. Archives v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Each requester is, therefore, a “representative of the news media.” 5 U.S.C. §§ 552(a)(4)(A)(ii). Accordingly, Requestors’ request for a fee waiver should be granted.

IV. Conclusion

If you need clarification regarding the appeal, have any questions, or foresee any obstacles to adjudicating this appeal in a timely manner, please contact Jeffrey Dubner at foia@democracyforward.org.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Jeffrey Dubner

Jeffrey Dubner
Senior Counsel
Democracy Forward Foundation

/s/ Tom Jawetz

Tom Jawetz
Vice President of Immigration Policy
Center for American Progress