



May 3, 2018

SENT VIA E-MAIL (ICE-FOIA@dhs.gov):

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

Re: FOIA Request Related to ICE Detention and Treatment of Pregnant Persons

Dear Freedom of Information Officer:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA) submitted on behalf of the American Civil Liberties Union (ACLU), the American Immigration Council (Council), and Women's Refugee Commission (WRC) (Requesters). The Requesters also request a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), and expedited processing, pursuant to 6 C.F.R. § 5.5(d) and 5 U.S.C. § 552(a)(6)(E). The justifications for the fee waiver and expedited processing are set out in detail following the request.

THE REQUESTERS

The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil liberties and civil rights in the U.S. It is the largest civil liberties organization in the country, with offices in 50 states and over one million members. The ACLU is specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

The Women's Refugee Commission improves the lives and protects the rights of women, children and youth displaced by conflict and crisis. We research their needs, identify solutions and advocate for programs and policies to strengthen their resilience and drive change in humanitarian practice. Since our founding in 1989, we have been a leading expert on the needs of refugee women and children, and the policies that can protect and empower them. Our Migrant Rights & Justice program works to ensure access to protection and due process for detained protection-seeking women and children in the United States informed by our own monitoring and research.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

PLEASE RESPOND TO
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DAVID C. FATHI
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**NOT ADMITTED IN DC:
PRACTICE LIMITED TO
FEDERAL COURTS*

REQUEST FOR INFORMATION

Requesters seek any and all records¹ that were prepared, received, transmitted, collected and/or maintained by the U.S. Immigration and Customs Enforcement (ICE) that describe, refer or relate to policies, guidelines, or procedures regarding the identification, detention and treatment of pregnant persons in ICE detention.² We request the specified records below from January 1, 2016 to the present (unless otherwise noted). Additionally, please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this FOIA request should also be considered within the request's scope. Where available, we request that records responsive to this request be produced in the original electronic format with all metadata and load files. We ask that any records produced in PDF, TIFF, or other image formats be produced in full, uncompressed form; please do not compress images or downsample the resolution, as this interferes with their legibility. To facilitate a speedy response, we ask that records responsive to this request be produced on a rolling basis.

For purposes of this request, the documents referenced herein are defined as follows:

“2016 Pregnancy Directive” means the Policy Directive issued by U.S. Immigration and Customs Enforcement entitled “Identification and Monitoring of Pregnant Detainees” (Directive 11032.2, issue date August 15, 2016). For reference, the 2016 Pregnancy Directive is attached as Exhibit A.

“2017 Pregnancy Directive” means the Policy Directive issued by U.S. Immigration and Customs Enforcement entitled “Identification and Monitoring of Pregnant Detainees” (Directive 11032.3, issue date December 14, 2017). For reference, the 2017 Pregnancy Directive is attached as Exhibit B.

Specific records requested:

1. Any and all records stored in the “system for tracking and monitoring all pregnant detainees in ICE custody” as noted in Sections 4.3(4) and 4.4(2) of the 2017 Pregnancy Directive including, but not limited to, any and all data that can be exported in electronic form in spreadsheet format (e.g., *.XLSX or *.CSV formats).

¹ The term “records” as used herein includes, but is not limited to: communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

² This includes detention by ICE in any of the following settings: Service Processing Centers, Contract Detention Facilities, Family Residential Facilities, Intergovernmental Service Agreement (IGSA) Facilities, Dedicated Intergovernmental Service Agreement (DIGSA) Facilities, Intergovernmental Agreement (IGA) Facilities, and any other facilities where individuals may be held in ICE custody for 72 hours or more.

2. Any and all records stored in the “system” for tracking of pregnant detainees as noted in Section 6 of the 2016 Pregnancy Directive including but not limited to, any and all data that can be exported in electronic form in spreadsheet format (e.g., *.XLSX or *.CSV formats).
3. Any and all records relating to or embodying any amendments, modifications, additions, deletions, or other changes to the 2016 Pregnancy Directive.
4. Any and all records related to IHSC “oversight and review of facility capabilities” as contemplated in Section 4.3(3) of the 2017 Pregnancy Directive.
5. Any and all records related to the 2016 and/or 2017 Pregnancy Directives that were sent from or received by any of the following ICE units or personnel:
 - a. Enforcement and Removal Operations;
 - b. Homeland Security Investigations;
 - c. Any ICE Field Office Director(s);
 - d. Any Special Agent(s) in Charge;
 - e. ICE Field Medical Coordinator;
 - f. ICE Health Service Corps;
 - g. Office of Detention Oversight;
 - h. Office of Detention Policy and Planning;
 - i. Office of the Director/Acting Director;
 - j. Office of the Deputy Director/Acting Deputy Director;
 - k. Office of the Principal Legal Advisor;
 - l. Chief of Staff;
 - m. Office of Public Affairs; and
 - n. Office of Congressional Relations.
6. Any and all records including but not limited to PowerPoint presentations and handouts, displayed or distributed to ICE and IHSC staff as well as any contractors in connection with any training related to the 2016 and/or 2017 Pregnancy Directives.

7. Any and all records including communications such as grievances and requests received by ICE from persons in ICE detention relating to pregnancy including medical and custody concerns related to pregnancy.
8. Any and all records generated in response to media inquiries, for public affairs purposes, or for media purposes that are related to the 2016 and/or 2017 Pregnancy Directives (including but not limited to talking points, quotes or statements provided to the press, and memoranda).
9. Any and all records discussing, preparing, proposing, editing, or approving records responsive to Request 8.
10. IHSC Policy No. 04-02 “Women’s Medical Care”, and any and all other IHSC policies regarding the provision of medical care to women in ICE custody. This includes all versions of such policy that were in effect during the request period, as well as any updates, amendments and attachments thereto.
11. ICE Policy No. 11020.1: “Use of GPS Monitoring Devices on Persons who are Pregnant or Diagnosed with a Severe Medical Condition (Sept. 14, 2009) as well as any updates, amendments and attachments thereto.
12. From Fiscal Year 2013 to the date this request is fulfilled, any databases, spreadsheets, lists, and other data compilations reflecting the following:
 - a. The total number of individuals ICE has identified as pregnant while in ICE detention, broken down by month and detention facility;
 - b. The total number of incidents of miscarriages and live births in ICE detention broken down by detention facility;
 - c. For each person identified as pregnant in ICE detention, the following data:
 - i. The total time period they remained in ICE detention, including the initial date of detention, date of release and any transfers between detention facilities;
 - ii. For each person released from ICE detention, information indicating whether the person was released on a grant of parole, bond, recognizance, an order of supervision, and/or placed into an ICE alternative to detention program;
 - iii. For each person who departed from the United States directly from ICE detention, information indicating whether the person departed on an order of voluntary departure, an expedited order of removal, reinstatement of prior removal order, final administrative removal order, or an order of removal entered by an Immigration Judge;

- iv. Information indicating whether and the number of times each person was transferred to an external medical facility such as a hospital, emergency room or other medical care facility for medical care or treatment associated with the pregnancy and the date of such transfer.

FEE WAIVER

Requesters ask for a total waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure “is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 6 C.F.R. § 5.11(k).³

1. *The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the Requesters.*

The detention and treatment of pregnant women in federal immigration custody is of great concern to the public. In December 2017, Immigration and Customs Enforcement made a decision to substantially revise a directive regarding the detention of pregnant women. The previous directive, issued in August 2016, only allowed the detention of pregnant women in narrow circumstances and required ICE to track custody determinations as well as medical care provided to all women in its custody. By contrast, the 2017 Pregnancy Directive eliminates the presumption of release and removes various reporting requirements.

This is a major change that has rightly generated significant public scrutiny.⁴ In response to this policy change, 276 organizations across the country joined in a letter calling on ICE to reverse its decision and reinstitute a presumption of release for pregnant persons.⁵ Major medical organizations including the American Academy of Pediatrics, American Academy of Family Physicians and American College of Obstetricians and Gynecologists also called on ICE to reverse its decision stating, “Pregnant women and adolescents should have access to high levels

³ In the alternative, Requesters ask for a limitation on fees pursuant to 6 C.F.R. § 5.11(d).

⁴ *See, e.g.* Abigail Abrams, *ICE Will Now Detain Pregnant Women Because of President Trump’s Executive Order*, Time, Mar. 30, 2018, available at <http://time.com/5221737/ice-detain-pregnant-immigrants-donald-trump/>; Alan Gomez, *ICE to Hold More Pregnant Women in Immigration Detention*, USA Today, Mar. 30, 2018, available at <https://www.usatoday.com/story/news/nation/2018/03/29/ice-hold-more-pregnant-women-immigration-detention/469907002/>; Elise Foley & Roque Planas, *ICE Ends Policy of Presuming Release For Pregnant Detainees*, Huff Post, Mar. 29, 2018, available at https://www.huffingtonpost.com/entry/immigration-customs-enforcement-pregnant-women_us_5abd07d7e4b03e2a5c7a4262; Rafael Bernal, *ICE Will Detain Pregnant Women, Ending Previous Policy*, The Hill, Mar. 29, 2018, available at <http://thehill.com/latino/380827-ice-will-detain-pregnant-women-ending-previous-policy>.

⁵ Coalition Letter to ICE, April 11, 2018, available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ICE%20sign-on%20letter%20FINAL%204.11.18.pdf>; see also, Letter from Mount Sinai Human Rights Program to ICE Regarding Impact of Detention on Pregnant Women and Adolescents, April 1, 2018, available at <http://www.aila.org/infonet/letter-to-ice-regarding-impact-ofdetention>.

of care, care that is not available in these facilities. The conditions in DHS facilities are not appropriate for pregnant women or children.”⁶

Pregnant women are a highly vulnerable group in the detention system. They face considerable stress including the inability to access necessary medical care and support, separation from family and the uncertainty of immigration proceedings. Prior to this policy change, the requesting organizations together with various partner groups submitted a complaint to the Department of Homeland Security Office of Inspector General and Office for Civil Rights and Civil Liberties in September 2017, asking them to investigate ICE’s treatment of pregnant women in its custody.⁷ The complaint highlights the cases of ten women who report being ignored and denied adequate medical care even in emergencies such as pain, bleeding and, in some instances, miscarriage. Many of the women detained by the Department of Homeland Security are survivors of abuse seeking protection in the United States. These reports raise immediate concerns about the health and safety of pregnant women in custody as well as the decisions made by the federal government to detain them.

The Requesters are not filing this Request to further a commercial interest. The requesting organizations are 501(c)(3) nonprofit organizations, each with the ability to widely disseminate the requested information through a variety of sources including reports, newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials are widely available to the public at no cost through a variety of sources including each organizations website, blogs and social media sites.

Specifically, the requesting organizations have a longstanding practice of disseminating information obtained through FOIA to further the public’s understanding of immigration laws and policy. For example, in 2016, the ACLU used documents obtained through FOIA requests to ICE, together with documents that the National Immigrant Justice Center (NIJC) obtained through FOIA, to publish a joint report with Detention Watch Network entitled *Fatal Neglect: How ICE Ignores Deaths in Detention*.⁸ This report described how ICE’s inadequate responses to its internal death review findings contributed to ongoing substandard medical care in detention, and has received significant public and congressional attention.

The American Immigration Council recently published a report examining records of alleged misconduct by Border Patrol agents and supervisors and another analyzing data obtained from ICE to provide a fuller picture of the Criminal Alien Program’s evolution, operations, and outcomes between fiscal years 2010 and 2013, all of which was previously unknown to the

⁶ Letter from American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Academy of Family Physicians to ICE Opposing Inhumane Detention Policies for Pregnant Women, March 29, 2018, available at http://www.aila.org/infonet/medic-professionals-against-ice-detention-policies?utm_source=aila.org&utm_medium=InfoNet%20Search

⁷ Increasing Numbers of Pregnant Women Facing Harm in Detention, Administrative Complaint filed with Office for Civil Rights and Civil Liberties, and the Office of the Inspector General, September 26, 2017, available at <https://www.womensrefugeecommission.org/rights/resources/1524-joint-complaint-ice-detention-treatment-of-pregnant-women>

⁸ ACLU, Detention Watch Network & NIJC, *Fatal Neglect: How ICE Ignores Deaths in Detention* (2016), available at <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>.

public.⁹ In October 2017, the Women’s Refugee Commission published a report on the detention of immigrant women in ICE custody, analyzing data obtained from ICE through FOIA to show the number of and shift in the detention of women in ICE custody in recent years.¹⁰

Thus, a fee waiver would fulfill Congress's legislative intent in amending the FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters” (internal quotation marks omitted)). *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) (“[FOIA’s] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers”) (internal quotation marks and citation omitted)). On account of these factors, Requesters have not been charged fees associated with responding to FOIA requests on numerous occasions.¹¹

2. *Requester ACLU is a representative of the news media and the records are not sought for commercial use.*

⁹ Guillermo Cantor, Ph.D., Mark Noferi, Esq., and Daniel E. Martinez, Ph.D., *Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program* (Nov. 2015), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf; Guillermo Cantor, Ph.D. and Walter Ewing, Ph.D., *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (Aug. 2017), available at <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

¹⁰ Women’s Refugee Commission, *Prison for Survivors: The Detention of Women Seeking Asylum in the United States* (2017), available at <https://www.womensrefugeecommission.org/rights/resources/1528-prison-for-survivors-women-in-us-detention-oct2017>.

¹¹ The following are recent examples of requests for which agencies did not charge the ACLU fees associated with responding to a FOIA request: In August 2016, the ICE FOIA Office and DHS Privacy Office both granted fee waivers to the ACLU for a FOIA request seeking a DHS OIG super-memorandum and ICE’s response to that memorandum. In March 2016, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about selected deaths in detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office. In July 2015, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about the use of segregation in ICE detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office. In April 2013, the National Security Division of the Department of Justice granted a fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the Department of Justice granted a fee waiver request regarding a FOIA request for documents related to national security letters issued under the Electronic Communications Privacy Act. In March 2012, the Department of Justice Criminal Division granted a fee waiver to the ACLU for a FOIA request seeking records about the government’s access to the contents of individuals’ private electronic communications. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In November 2010, the Federal Emergency Management Agency (FEMA) granted a fee waiver to the ACLU for a FOIA request seeking documents concerning the FEMA-funded rebuilding of Orleans Parish Prison following Hurricane Katrina. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2010, U.S. Immigration and Customs Enforcement (ICE) granted a fee waiver to the ACLU for a FOIA request seeking documents concerning the deaths of detainees in ICE custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November 2006.

Furthermore, Requesters also request a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, the ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III).¹² See also *Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (finding requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information").¹³ The ACLU is therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information."

The ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. Disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. This material is broadly circulated to the public in a variety of formats and widely available to everyone for no cost or, sometimes, for a small fee. These reports, analysis, multi-media features, including videos and podcasts, as well as case related news and archives addressing civil rights and liberties issues are disseminated through the ACLU website. See <https://www.aclu.org>.

In addition, the ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. In the past year alone, the ACLU's online articles were viewed 11.3 million times. ACLU content gets more reader engagement – shares, clicks, and likes – than sites operated by many traditional media companies. The ACLU's social media content has 2.2 million total page "likes," which is more than The Atlantic, ThinkProgress, and Vox. Therefore, when it conducts these public education and dissemination activities, the ACLU is a representative of the news media.

Underscoring this point, courts have found that other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's are

¹² See also 5 C.F.R. § 2604.103; 28 C.F.R. § 16.10(b)(6); 5 C.F.R. § 294.103(c); and 41 C.F.R. § 105-60.305-1 (i).

¹³ Other courts have found that the ACLU and organizations with similar missions engaging in information-dissemination similar to the ACLU's are "primarily engaged in disseminating information." *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

"representatives of the news media" as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5, 10- 15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).¹⁴

As representatives of the news media, Requesters plan to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost. On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a "representative of the news media."¹⁵

EXPEDITED PROCESSING

We request Track 1 expedited treatment for this FOIA request, which qualifies for expedited treatment pursuant to 6 C.F.R. § 5.5(e) and 5 U.S.C. § 552(a)(6)(E). There exists a clear "urgency to inform the public concerning actual or alleged Federal Government activity," and the Requesters are "primarily engaged in dissemination of information." 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. § 5.5(e)(1)(ii) (expedited processing is warranted where there is "[a]n urgency to inform the public about an actual or alleged federal government activity.").

¹⁴ Courts have found these organizations to be "representatives of the news media" even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

¹⁵ In May 2016, the FBI granted a fee-waiver request regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to "national security letters" issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

As set forth in the numerous cites *supra* in the fee waiver section, the treatment of pregnant persons in ICE custody is a matter of widespread media and public interest, and the requested records will inform the public concern of this activity by ICE. 5 U.S.C. § 552(a)(6)(E)(i)(I). The urgency to inform the public goes beyond the general public interest in government transparency—it responds to ongoing serious concerns from Congress and the public, and will answer specific questions that have very recently been raised regarding ICE’s decision to significantly change a policy about the detention of pregnant persons.

The Requesters are primarily engaged in the dissemination of information. As described *supra*, our organizations produce newsletters, news briefings, right-to-know handbooks, and other materials that are distributed to the public. As mentioned *supra*, the requesting organizations will likely distribute the information obtained through this FOIA request through these as well as other means available to us.

Furthermore, there is a “compelling need” for expedited processing. 5 U.S.C. § 52(a)(6)(E)(i)(I). Denial of expedited disclosure of records revealing information about detention and treatment of pregnant women under the ICE pregnancy directive could “reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” 5 U.S.C. § 552(a)(6)(E)(v)(I); 6 C.F.R. § 5.5(d)(1)(i).

As noted *supra*, at the time ICE was revising the 2016 Pregnancy Directive, our organizations documented many cases in which pregnant women were not receiving adequate medical care and suffered extreme physical and mental harm. Some women experienced miscarriages while in DHS custody. Furthermore, recent statements by medical experts discussed above underscore that there is serious risk to pregnant women who are detained. Delay in the disclosure of information about the treatment of pregnant persons in ICE custody could prevent abuses from coming to light and being corrected, thereby increasing the chances of avoidable injuries or even deaths in the future.

Pursuant to 6 C.F.R. § 5.5(d)(3), the undersigned certifies that the information provided above as the basis for requesting expedited processing is true to the best of their knowledge and belief.

* * *

Thank you for your consideration of this request. If this Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions of the FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or deny a waiver of fees. We expect your reply to this Request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

Please provide all responsive records to:

Victoria Lopez, Senior Staff Attorney
ACLU National Prison Project
915 15th St. NW, 7th Floor
Washington, DC 20005

Thank you for your attention to this request.

Sincerely,

/s/ Victoria Lopez

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EXHIBIT A



U.S. Immigration
and Customs
Enforcement

AUG 15 2016

MEMORANDUM FOR: Field Office Directors
Deputy Field Office Directors
Assistant Field Office Directors
ICE Health Service Corps

FROM: Thomas Homan
Executive Associate Director

SUBJECT: Identification and Monitoring of Pregnant Detainees

1. Purpose/Background.

- 1.1 U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) must consider and address the particular needs and vulnerabilities of pregnant women detained in its custody. As directed in Secretary Johnson's memorandum, entitled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), absent extraordinary circumstances or the requirement of mandatory detention, pregnant women will generally not be detained by ICE. While detained in ICE custody, pregnant women will be re-evaluated regularly to determine if continued detention is warranted, receive appropriate prenatal care, and be appropriately monitored by ICE for general health and well-being.
- 1.2 This memorandum sets forth procedures to ensure that pregnant individuals detained in ICE custody are identified, monitored, and housed in the most appropriate facility to manage their care. The memorandum outlines the relevant responsibilities of offices within ERO to identify and track pregnant detainees, ensure that they are receiving appropriate prenatal care, and re-evaluate their continued detention on an ongoing basis.
- 1.3 This memorandum codifies existing ICE policy and procedures that address the identification and monitoring of pregnant women detained in ICE custody, and complements ICE's national detention standards and ICE Health Service Corps (IHSC) policies, including those referenced below.¹

¹ Unless stated otherwise, any reference to "ICE's national detention standards" within this memorandum refers to the 2000 National Detention Standards, the 2008 Performance-Based National Detention Standards, and the 2011 Performance-Based National Detention Standards.

2. Policy.

- 2.1 ERO is committed to identifying and providing appropriate care for pregnant women detained in ICE custody. ICE's national detention standards require facilities housing immigration detainees to provide the following to all newly admitted detainees: (1) an initial medical screening immediately upon their arrival, including appropriate pregnancy screening; (2) a 14-day full medical assessment; and (3) timely referral for appropriate prenatal and medical care.
- 2.2 Consistent with ICE's national detention standards, detention facilities are required to notify ERO whenever a pregnant detainee is identified (i.e., detainees with "special needs"). The Field Office Director (FOD) shall take steps to ensure he or she is notified whenever a detainee is determined to be pregnant, and shall notify IHSC Headquarters (HQ) as further provided in Sections 5.1 through 5.3, below. FODs will coordinate with ERO Field Operations on an ongoing basis to determine whether continued detention of the pregnant detainee is warranted. The FOD shall also coordinate with IHSC on an ongoing basis to ensure that the pregnant detainee is appropriately housed, to track the term of the pregnancy, and to ensure the pregnant detainee is receiving necessary and appropriate medical care while in custody.
- 2.3 IHSC will maintain information regarding all pregnant detainees in ICE custody, based on information received from the FODs, IHSC Health Services Administrators (HSAs), IHSC Field Medical Coordinators (FMCs), and other designated IHSC personnel. IHSC will develop a system for maintaining this information, providing for ongoing monitoring, tracking, and communication with the field concerning the medical condition of the pregnant detainee and/or the fetus.

3. Superseded Policies and Guidance. The following ICE policy is hereby superseded:

- 3.1 ICE Policy No. 11032.1: *Monitoring of Pregnant Aliens in DRO Custody* (Oct. 24, 2007).

4. Apprehension, Detention, and Release. If a pregnant detainee is not subject to mandatory detention, or is otherwise eligible for parole after a finding of credible fear, the FOD shall ensure she is not detained or, if already detained, is released from detention unless the FOD determines that "extraordinary circumstances" warrant detention.² Any decision to detain a woman determined to be pregnant, who is not subject to mandatory detention, must be approved by the FOD, and the FOD must notify ERO Field Operations of the decision. If a pregnant detainee would be subject to mandatory detention, the FOD shall, when feasible, consult with Office of the Principal Legal Advisor (OPLA) management prior to making a custody determination. Pregnant women released subject to enrollment in an Alternatives to

² Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

Detention program will not be required to wear a radio frequency or global positioning system monitor.

5. Identification and Notification Procedures.

- 5.1 IHSC facilities. In detention facilities staffed by IHSC, the HSA shall notify the FOD as soon as practicable of any detainee housed at the facility who is determined to be pregnant, but no later than 72 hours after such determination.
- 5.2 Non-IHSC facilities. In facilities not staffed by IHSC, the FOD, in coordination with the FMC or other designated IHSC personnel, shall take steps to ensure that he or she is notified as soon as practicable by facility custody personnel or medical staff of any detainee housed at the facility who is determined to be pregnant, but no later than 72 hours after such determination.
- 5.3 Upon receipt of notification from detention facility personnel, IHSC or other ERO personnel, or any other source, of a detainee determined to be pregnant, the FOD, in coordination with HSAs, FMCs and other designated IHSC personnel in the FOD's area of responsibility, shall immediately notify IHSC HQ, in writing, of the detainee's pregnancy.

6. Centralized Tracking of Pregnant Detainees. In coordination with ERO Field Operations and the ERO Custody Management, IHSC HQ shall collect and maintain relevant information received from the FODs, HSAs, FMCs, and other designated IHSC personnel regarding pregnant detainees, and shall develop a system for maintaining that information to allow for ongoing monitoring and tracking.

7. Monitoring Status of Pregnant Detainees

- 7.1 Upon receipt of information that a detainee is pregnant, IHSC shall review facility capabilities to determine if another detention or off-site treatment facility would provide an environment better suited to the needs of the detainee. IHSC shall immediately report its conclusion to the FOD and, where appropriate, suggest the detention facility for transfer and treatment.³ Where it is determined that the detainee is not appropriately housed, absent exceptional circumstances, the FOD shall transfer the detainee as soon as practicable. All transfer determinations shall be made in accordance with the requirements of ICE Policy No. 11022.1: *Detainee Transfers* (Jan. 4, 2012).
- 7.2 IHSC shall, in coordination with the FOD, continuously monitor the detainee's condition and ensure the detainee is receiving appropriate care. The term of the pregnancy, as well as the general health of the pregnant detainee and the medical condition of the fetus must all be monitored while the detainee remains detained in ICE

³ In facilities not staffed by IHSC, IHSC and the FMC will work with facility medical staff, but will not control or provide direct medical care.

custody. HSAs, FMCs, and other designated IHSC personnel shall provide updates to IHSC HQ at least weekly.

- 7.3 HSAs, FMCs, and other designated IHSC personnel must report any major changes in the health of the pregnant detainee or the medical condition of the fetus to the FOD and to IHSC HQ immediately.

8. Re-evaluating Custody Status of Pregnant Detainees.

- 8.1 At least weekly, ERO Field Operations shall, in consultation with IHSC HQ and OPLA management, evaluate whether each pregnant detainee's continued detention is appropriate.
- 8.2 In cases ERO Field Operations deems appropriate, it shall consult with the relevant FOD to consider whether a pregnant detainee's continued detention warrants reconsideration.

9. Authorities and References.

- 9.1 Immigration and Nationality Act §§ 212(d)(5), 235(b), 236, 241.
- 9.2 8 C.F.R. §§ 1.1(q), 212.5, 235.3, 236.2(b).
- 9.3 Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).
- 9.4 National Detention Standards, including "Medical Care" Standard.
- 9.5 2008 Performance Based National Detention Standards, including Standard 4.3 "Medical Care."
- 9.6 2011 Performance Based National Detention Standards, including:
- 1) Standard 4.3 "Medical Care."
 - 2) Standard 4.4 "Women's Medical Care."
- 9.7 IHSC Policy 04-02 "Women's Medical Care."
- 9.8 ICE Policy No. 11020.1: *Use of GPS Monitoring Devices on Persons who are Pregnant or Diagnosed with a Severe Medical Condition* (Sept. 14, 2009).

10. **No Private Right of Action.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity by any party in any criminal, civil, or administrative matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

EXHIBIT B

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 11032.3: Identification and Monitoring of Pregnant Detainees

Issue Date: December 14, 2017
Effective Date: December 14, 2017
Superseded: ICE Policy 11032.2: *Identification and Monitoring of Pregnant Detainee* (August 15, 2016).
Federal Enterprise Architecture Number: 306-112-002b

1. **Purpose/Background.** This Directive sets forth policy and procedures to ensure pregnant detainees in U.S. Immigration and Customs Enforcement (ICE) custody for immigration violations are identified, monitored, tracked, and housed in an appropriate facility to manage their care. This Directive codifies existing ICE policy and procedures and complements ICE's national detention standards¹ and ICE Health Service Corps (IHSC) policies.
2. **Policy.** ICE is committed to identifying and providing appropriate care for pregnant detainees in ICE custody. ICE's detention standards generally require detention facilities to notify ICE after a pregnant detainee is identified.

Enforcement and Removal Operations (ERO) officers and Homeland Security Investigations (HSI) agents will notify their Field Office Directors (FODs) and Special Agents in Charge (SACs), respectively, when they arrest and detain a pregnant individual in ICE custody. HSI SACs shall notify the ERO FOD when administratively arresting a pregnant individual who will be detained in ICE custody. ERO FODs shall notify the local Field Medical Coordinator (FMC) upon learning of a pregnant detainee.

3. **Definitions.** None.
4. **Responsibilities.**
 - 4.1. **ERO Field Office Directors** are responsible for:
 - 1) Ensuring local IHSC and custody personnel, or medical staff in non-IHSC staffed facilities, have a process in place to notify the FOD, consistent with applicable detention standards, no later than 72 hours after a detainee is determined to be pregnant;
 - 2) Ensuring detention facilities are aware of their obligations regarding pregnant detainees under this Directive and applicable ICE detention standards;

¹ Refers to the National Detention Standards (NDS) 2000, Performance-Based National Detention Standards (PBNS) 2008, and the PBNS 2011.

- 3) Ensuring pregnant detainees receive appropriate medical care including effectuating transfers² to facilities that are able to provide appropriate medical treatment;
- 4) Monitoring, in coordination with IHSC, the condition of pregnant detainees; and
- 5) Ensuring that ERO officers are aware of policy related to the use of restraints for pregnant detainees.

4.2. HSI Special Agents in Charge (SACs) are responsible for:

- 1) Ensuring the HSI agents notify the SAC as soon as practical when a pregnant individual is arrested;
- 2) Notifying the FOD as soon as practical when a pregnant individual is arrested and is detained in ICE custody; and
- 3) Ensuring HSI agents are aware of policy related to the use of restraints for pregnant detainees.

4.3. IHSC Personnel are responsible for:

- 1) Notifying the FOD and IHSC HQ, as soon as practical, when a pregnant detainee is identified;
- 2) Monitoring, in coordination with the FOD, the condition of pregnant detainees, including the term of the pregnancy, general health of the pregnant detainee, and medical condition of the fetus, and communicating with the FOD about any specific risk factors or concerns;
- 3) Oversight and review of facility capabilities to determine if a pregnant detainee's needs can be accommodated and recommending to the FOD when a pregnant detainee's transfer to another facility is necessary for appropriate medical care; and
- 4) Developing and maintaining a system for tracking and monitoring all pregnant detainees in ICE custody.

4.4. ERO Field Operations Personnel are responsible for:

- 1) Consulting with FODs and IHSC on custody determinations or detention facility placement decisions for a pregnant detainee; and
- 2) Providing case, location, and status information as appropriate to assist IHSC with tracking and monitoring pregnant detainees.

² All transfer determinations shall be made in accordance with the requirements of ICE Policy 11022.1: *Detainee Transfers* (Jan. 4, 2012), or as updated.

4.5. ICE Officers and Agents are responsible for notifying, as soon as practical, the SAC or FOD, through their chain of command, when a pregnant individual is arrested and detained in ICE custody.

5. Procedures/Requirements.

5.1. Medical Needs of Detainees. IHSC will assess detention facilities to determine their ability to meet the needs of pregnant detainees and monitor and track the medical condition of individual pregnant detainees while in ICE custody. When it is determined that a facility cannot provide appropriate medical care in a particular case, the pregnant detainee will be transferred to another detention facility or off-site treatment facility that can provide appropriate medical care.

6. Recordkeeping. IHSC will maintain medical records in accordance with records retention schedule DAA 567-2015-0002, which states in relevant part, that medical records for an adult will be retained for 10 years after an individual has been released from ICE custody, and then shall be destroyed. Medical records for minors must be retained until the minor's 27th birthday. ERO will maintain the records of custody determinations in accordance with records schedule DAA-0563-2013-0001-006. These records are destroyed 75 years after the end of the calendar year in which the data is gathered.

7. Authorities/References.

7.1. Immigration and Nationality Act §§ 212(d)(5), 235(b), 236, & 241.

7.2. 8 C.F.R. §§ 1.1(q), 212.5, 235.3, & 236.2(b).

7.3. 2000 National Detention Standards, including "Medical Care" Standard.

7.4. 2008 Performance Based National Detention Standards, including Standard 4.3 "Medical Care."

7.5. 2011 Performance Based National Detention Standards, including: Standard 2.15 "Use of Force and Restraints"; Standard 4.3 "Medical Care"; and Standard 4.4 "Women's Medical Care."

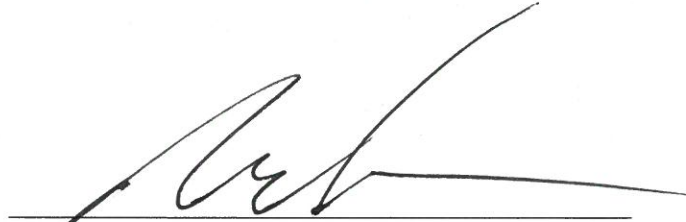
7.6. IHSC Policy 04-02 "Women's Medical Care."

7.7. ICE Policy No. 11020.1: *Use of GPS Monitoring Devices on Persons who are Pregnant or Diagnosed with a Severe Medical Condition* (Sept. 14, 2009), or as updated.

8. Attachments. None.

9. No Private Right. This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended

to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



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Performing the Duties of the Director
U.S. Immigration and Customs Enforcement