

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER
FOR EDUCATION AND LEGAL
SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, and

KEVIN K. MCALEENAN, in his official
capacity as Acting Secretary of Homeland
Security,

Defendants.

Civil Action No. 18-cv-2473-RC

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)
AND FOR LEAVE TO AMEND UNDER RULE 15(a)

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PRELIMINARY STATEMENT

Plaintiffs Citizens for Responsibility and Ethics in Washington (“CREW”) and Refugee and Immigrant Center for Education and Legal Services, Inc. (“RAICES”) brought this action to challenge ongoing violations of the Federal Records Act (“FRA”) by Defendants U.S. Department of Homeland Security and the Secretary of Homeland Security (collectively, “DHS”). On May 24, 2019, the Court granted DHS’s motion to dismiss Plaintiffs’ First Amended Complaint (“FAC”) in its entirety under Rule 12(b)(6). *See* Order, ECF No. 24; Mem. Op., ECF No. 25.

In dismissing Claim One of the FAC, the Court recognized that, per the Circuit’s decision in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), the Administrative Procedure Act (“APA”) does authorize claims challenging an agency’s recordkeeping guidelines and directives. Mem. Op. at 28, 32. But, in the Court’s view, Plaintiffs’ Claim One was broader than the claim permitted in *Armstrong*, it exceeded the limitations on APA review articulated in *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 66 (2004), and Plaintiffs’ efforts to clarify the scope of the claim were merely an attempt to amend their complaint via their opposition brief. Mem. Op. at 32-33. Critically, because the Court’s order did not specify whether dismissal was with or without prejudice, it operated as a dismissal *with* prejudice. *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (dismissal for failure to state a claim is with prejudice “unless the dismissal order states otherwise”) (quoting Fed. R. Civ. P. 41(b)); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1340 (D.C. Cir. 2015) (same).

Plaintiffs now move under Rule 59(e) to alter or amend the Court’s order from a dismissal of Claim One with prejudice to a dismissal without prejudice, and move under Rule 15(a) for leave to file the proposed Second Amended Complaint (“SAC”), attached as Exhibit 1. The proposed SAC asserts a single APA claim challenging the adequacy of DHS’s recordkeeping guidelines and directives—i.e., a claim squarely authorized by *Armstrong*.

The Rule 59(e) and 15(a) tests are readily satisfied here. First, dismissal of Claim One *with prejudice* was clear error, both because the Court did not make the requisite finding that the allegation of other facts consistent with Claim One “could not possibly cure” its perceived deficiencies, and because that “exacting standard,” once applied, is plainly not met here. To the contrary, the Court’s own analysis indicates that amending Claim One to make it conform strictly with *Armstrong* could cure the claim’s purported deficiencies. Second, leave to amend should be granted because none of the factors that could warrant denial of leave—undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies with prior amendments, or futility of amendment—are present here. In fact, any delay in Plaintiffs’ challenge to DHS’s official recordkeeping policies is attributable solely to *DHS’s* refusal to release those policies prior to this suit, despite Plaintiffs’ diligent efforts to obtain them.

For all these reasons, Plaintiffs’ combined Rule 59(e) and Rule 15(a) motion should be granted.¹

¹ Although the present motion seeks no relief with respect to the Court’s dismissal of Claims Two and Three of the FAC, Plaintiffs continue to believe the FAC adequately alleged all claims, and reserve the right to appeal the Court’s May 24, 2019 Order. *See* Fed. R. App. P. 4(a)(4)(iv) (time for filing notice of appeal is tolled pending resolution of Rule 59 motion). Plaintiffs’ filing of this motion is not a concession that dismissal of the FAC was proper.

ARGUMENT

A plaintiff may “amend [its] complaint after it was dismissed with prejudice ‘only by filing . . . a 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave of court to amend their complaint.’” *Brink v. Cont’l Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Both the Rule 59(e) and Rule 15(a) standards are satisfied here.

I. Plaintiffs’ Rule 59(e) Motion Should Be Granted Because Dismissing Claim One With Prejudice Was Clearly Erroneous

Where, as here, a complaint is dismissed with prejudice and the plaintiff files a combined Rule 59(e) and Rule 15(a) motion, “denial of the Rule 59(e) motion . . . is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, the Rule 59(e) motion should be granted unless ‘the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” *Id.* As the Circuit has explained, “[d]ismissal with prejudice is the exception, not the rule, in federal practice because it ‘operates as a rejection of the plaintiff’s claims on the merits and [ultimately] precludes further litigation of them.’” *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012). “Accordingly, the ‘standard for dismissing a complaint with prejudice is high’” and “exacting.” *Id.*; *see also Brink*, 787 F.3d at 1129 (describing standard as a “high bar”).

Here, dismissing Claim One with prejudice was clearly erroneous for two independent reasons. First, the Court did not “explain, with reference to the standard [the Circuit] set in *Firestone*, why it dismissed [Plaintiffs’] complaint with prejudice.” *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006). That alone was clear error. *See id.* (reversing district court’s

dismissal with prejudice where it made no determination that the plaintiff “could not allege additional facts that would cure the deficiencies in her complaint—the standard under *Firestone* for dismissal with prejudice”).

Second, applying the *Firestone* standard, the “high bar” for dismissal with prejudice is plainly not met here. This Court recognized that, per *Armstrong*, the APA does allow claims challenging an agency’s recordkeeping guidelines and directives. Mem. Op. at 28, 32. The Court went on to hold that Claim One did not sufficiently plead such a claim, that the claim was instead a broader challenge to DHS’s agency-wide records management program, and that Plaintiffs’ efforts to clarify the scope of the claim were an impermissible attempt to amend the complaint via an opposition brief. *See id.* at 32-33. But while the Court deemed Plaintiffs’ claim deficiently pleaded, nothing in its analysis suggests that the “allegation of other facts consistent with the challenged pleading *could not possibly cure the deficiency.*” *Brink*, 787 F.3d at 1128 (emphasis added). To the contrary, the Court suggested precisely how Plaintiffs *could* cure the purported deficiency—i.e., by asserting a narrower claim explicitly challenging DHS’s recordkeeping guidelines and directives. Because there is no basis for dismissing Claim One with prejudice, the Court should alter its May 24, 2019 Order to dismiss Claim One without prejudice.²

² As explained in greater detail *infra* Part II.A, dismissing Claim One with prejudice would also be fundamentally unfair because DHS repeatedly refused to disclose its operative recordkeeping policies prior to this suit—despite Plaintiffs’ diligent efforts to obtain them—and released them for the first time during this litigation. Dismissal with prejudice would therefore have the perverse result of rewarding DHS’s stonewalling tactics, allowing it to evade judicial review of its defective recordkeeping policies merely by delaying their disclosure.

II. Plaintiffs’ Rule 15(a) Motion Should Be Granted Because There is No Basis to Deny Leave to Amend

“Leave to amend a complaint under Rule 15(a) ‘shall be freely given when justice so requires.’” *Firestone*, 76 F.3d at 1208 (quoting Fed. R. Civ. P. 15(a)). “Although the grant or denial of leave to amend is committed to a district court’s discretion, it is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as ‘undue delay, bad faith or dilatory motive, . . . repeated failure to cure deficiencies by [previous] amendments, . . . [or] futility of amendment.’” *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). None of the grounds for denying leave to amend are present here.

A. There Are No Concerns of Undue Delay, Bad Faith, Dilatory Motive, or Repeated Failures to Cure Deficiencies by Previous Amendments

This is Plaintiffs’ first request for leave to amend,³ and it comes promptly after the Court dismissed the FAC, consistent with the procedure outlined in *Firestone*. It would also be the first amendment to benefit from the Court’s analysis of the FAC’s perceived deficiencies which, as explained in detail below, are fully addressed in the proposed SAC. In addition, this litigation is still in its infancy—DHS has not yet filed an answer, and no discovery has been taken.

Plaintiffs’ diligence is underscored by the fact that Plaintiffs repeatedly sought DHS’s operative recordkeeping policies before filing suit, but were stonewalled by the agency. Unlike other agencies, DHS does not proactively disclose its recordkeeping policies on its website. So, on October 12, 2018—two months before Plaintiffs filed the FAC on December 14, 2018—CREW submitted a Freedom of Information Act (“FOIA”) request to DHS seeking those

³ Plaintiffs previously amended once as of right pursuant to Rule 15(a)(1).

policies. Ex. 2. DHS failed to respond to CREW's FOIA request by the statutory deadline, and still has not responded to it to this day. Separately, on October 15, 2018, CREW emailed DHS's Records Officer seeking the agency's operative recordkeeping policies. *See* Ex. 3. CREW explained that although DHS's website includes a "records management directive" referencing a "publication" that purportedly outlines the agency's recordkeeping policies and procedures, the publication itself is not posted on DHS's website. *Id.* DHS responded that if the "policy is not available on the DHS.gov site, then [CREW] will need to file a FOIA request." *Id.* DHS later added that the records management directive cited by CREW has actually "been superseded," Ex. 4, even though it remains on DHS's website as a purported statement of operative agency policy. *See* DHS, Records Management Directive 0550.1, *available at* <https://www.dhs.gov/publication/records-management-directive-05501>. CREW responded that it had already submitted a FOIA request, explained that the agency's recordkeeping policies were subject to FOIA's "proactive disclosure" provisions and thus should be made available on its website, and renewed its request for the policies. Ex. 4. DHS never responded to CREW's email.

Because DHS repeatedly denied Plaintiffs access to its operative recordkeeping policies, Plaintiffs were unable to identify and plead *specific* deficiencies in those policies in the FAC. Rather, based on the well-documented history of systematic recordkeeping failures at DHS, Plaintiffs drew the reasonable inference that the agency had a deficient records management program (a central component of which is the agency's recordkeeping guidelines and directives), and so alleged in Claim One of the FAC. It was not until March 2019, when DHS filed its

motion to dismiss in this case, that the agency finally disclosed its operative recordkeeping policies, *see* ECF No. 19-2, which are, as outlined below, indeed non-compliant with the FRA. Plaintiffs should not be penalized for failing to earlier identify particular flaws in DHS’s recordkeeping policies, when DHS refused to disclose those very policies until it deemed it strategically necessary to do so for litigation purposes. Denial of leave to amend would serve only to reward DHS’s stonewalling tactics.

In short, there is no basis for denying leave to amend based on “undue delay, bad faith or dilatory motive, [or] . . . repeated failure to cure deficiencies by [previous] amendments.” *Firestone*, 76 F.3d at 1208.

B. The Proposed Amendment Would Not Be Futile

Nor would Plaintiffs’ proposed amendment be futile. In assessing futility, courts ask whether the proposed amended complaint would “survive a motion to dismiss”—i.e., whether it “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010). Here, the proposed SAC plausibly alleges an APA claim challenging DHS’s deficient recordkeeping guidelines and directives.

To begin, as this Court has already recognized, *Armstrong* allows a plaintiff to “challenge an agency’s recordkeeping guidelines pursuant to the APA.” Mem. Op. at 28. The Circuit could not have been clearer on that point. *See Armstrong*, 924 F.2d at 297 (“[T]he APA authorizes judicial review of plaintiffs’ claim that the [agency’s] recordkeeping guidelines and directives are arbitrary and capricious.”); *id.* at 293 (“[W]e hold that the district court was authorized to

hear plaintiffs' APA claim that the [agency's] recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA."); *id.* at 297 (instructing district court on remand to determine—following development of a detailed factual record containing the “total ‘guidance’ given to [agency] staff regarding their recordkeeping responsibilities”—whether “the [agency's] recordkeeping guidelines and directives satisfy the [agency's] statutory obligations to ‘make and preserve records’ documenting the ‘functions, policies, decisions, procedures, and essential transactions’ of the [agency], and to ensure that these records are destroyed only pursuant to disposal schedules approved by the Archivist”); *see also Armstrong v. EOP*, 1 F.3d 1274, 1282-87, 1296 (D.C. Cir. 1993) (on second appeal, affirming district court's ruling that agency's “electronic records management guidelines violate the FRA”). Although this Court found that Plaintiffs' FAC failed to sufficiently plead an *Armstrong* claim, *see* Mem. Op. at 32-33, the proposed SAC fully corrects that perceived deficiency.

The proposed SAC alleges that DHS's recordkeeping guidelines and directives—consisting of the total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal, *see Armstrong*, 924 F.2d at 297—fail to provide adequate guidance on the FRA's records-creation requirements in accordance with the FRA, and thus are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Ex. 1 (Proposed SAC) ¶¶ 74-83 (quoting 5 U.S.C. § 706(2)(A)). In support of this claim, the proposed SAC attaches the operative recordkeeping policies DHS publicly disclosed for the first time in this suit. *See id.*, Ex. 1 (DHS Directive 141-01 (issued August 11, 2014)), and Ex. 2

DHS Instruction 141-01-001 (issued June 6, 2017)). As alleged in the proposed SAC, Directive 141-01 and Instruction 141-01-001 fail to comply with the FRA because they do not:

- Provide instructions on, or even make reference to, the records-creation requirements set forth in 4 U.S.C. § 3101 and 36 C.F.R. § 1222.22, including the requirements to create records sufficient to (1) “[d]ocument the persons, places, things, or matters dealt with by the agency”; (2) “[f]acilitate action by agency officials and their successors in office”; (3) “[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government”; (4) “[p]rotect the financial, legal, and other rights . . . of persons directly affected by the Governments actions”; (5) “[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically”; and (6) “[d]ocument important board, committee, or staff meetings.” 36 C.F.R. § 1222.22(a)-(f).
- “Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties.” 36 C.F.R. § 1222.24(a)(1).
- Identify “[t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions.” 36 C.F.R. § 1222.26(a).

- Identify specific “information and documentation that must be included in” the agency’s “record series and systems.” 36 C.F.R. § 1222.28(a).
- Include “[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.” 36 C.F.R. § 1222.28(d).

See Ex. 1 (Proposed SAC) ¶ 77.

The proposed SAC further alleges, on information and belief, that “Directive 141-01 and Instruction 141-01-001 are the only formal policies designed to implement the FRA’s recordkeeping requirements currently in effect at DHS”; “DHS fails to provide any informal or supplementary guidance to agency employees including adequate guidance on the FRA records-creation requirements outlined above”; and “DHS’s records management training, provided pursuant to 36 C.F.R. § 1220.34(f) and § 1222.24(b), fails to include adequate guidance on the FRA records-creation requirements outlined above.” *Id.* ¶¶ 78-80. It also details at length how the flaws in DHS’s recordkeeping guidelines and directives have manifested, describing DHS’s well-documented history of overall recordkeeping failures and specific failures in connection with child separations. *See id.* ¶¶ 31-61.⁴ Accepting the proposed SAC’s allegations as true and viewing them in the light most favorable to Plaintiffs, they more than plausibly allege that DHS’s

⁴ To be clear, Plaintiffs do not seek relief with respect to the particular recordkeeping failures discussed in paragraphs 31 through 61 of the proposed SAC; Plaintiffs point to these as mere *manifestations* of DHS’s woefully deficient recordkeeping guidelines and directives, which, in turn, reinforces the plausibility of Plaintiffs’ claim.

recordkeeping guidelines and directives are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

To be sure, the Court dismissed Claim One of the FAC because it found that it failed the *SUWA* test. *See* Mem. Op. at 31-32. Under that test, “a claim under § 706(1) [of the APA] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” *SUWA*, 542 U.S. at 64 (emphasis added). But, unlike the FAC’s Claim One, the proposed SAC does not assert a theory of agency *inaction* under § 706(1); it instead challenges DHS’s *operative* recordkeeping guidelines and directives as arbitrary and capricious under § 706(2)(A). *See* Ex. 1 (Proposed SAC) ¶ 81. The *SUWA* framework—which concerns “limits the APA places upon judicial review of *agency inaction*,” 542 U.S. at 61 (emphasis added)—is thus inapt. Indeed, *Armstrong* makes clear that an agency’s recordkeeping guidelines and directives qualify as discrete and reviewable “agency action” for purposes of a § 706(2)(A) claim, and that ruling remains the law of this Circuit. *See Armstrong*, 924 F.2d at 297; *see also* 5 U.S.C. § 551(13) (defining “agency action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof”).⁵

Even assuming the *SUWA* test were applicable, it is readily satisfied. Again, that test requires that the agency action sought to be compelled be both (1) “discrete” and (2) “legally required.” 542 U.S. at 63-64. Consistent with this standard, the proposed SAC challenges

⁵ Although *Armstrong* was decided before *SUWA*, there is no conflict between the two decisions. To the contrary, the Circuit has had no problem harmonizing the *SUWA* test with *Armstrong*’s allowance of APA review of certain FRA violations. *See Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954-55 (D.C. Cir. 2016) (addressing interplay of *Armstrong* and *SUWA*).

DHS's discrete failure to adopt recordkeeping guidelines and directives in accordance with FRA provisions that impose specific, non-discretionary duties to adopt "recordkeeping requirements" that:

- "**shall** provide for . . . compliance with" various FRA provisions and implementing regulations, including the records-creation requirements set forth in 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. 44 U.S.C. § 3102(4) (emphasis added).
- "**must** . . . [i]dentify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties." 36 C.F.R. § 1222.24(a)(1) (emphasis added).
- "**must** . . . identify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions." 36 C.F.R. § 1222.26(a) (emphasis added).
- "**must** . . . identif[y] information and documentation that must be included in" the agency's "record series and systems." 36 C.F.R. § 1222.28(a) (emphasis added).
- "**must**" include "[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities." 36 C.F.R. § 1222.28(d) (emphasis added).

The regulations further provide that "[a]gencies **must** provide the training described in § 1220.34(f) of this subchapter and inform all employees that they are responsible and accountable

for keeping accurate and complete records of their activities.” 36 C.F.R. § 1222.24(b) (emphasis added).

The above provisions leave DHS no discretion as to the specified items that “must” be included in the agency’s recordkeeping guidelines and directives, and the specified training that “must” be provided to agency employees. The proposed SAC is therefore fully consistent with *SUWA*, to the extent that case is deemed applicable. *See Judicial Watch*, 844 F.3d at 954 (*SUWA* test satisfied by APA claim challenging failure of agency and Archivist to take enforcement actions under the FRA’s recovery provisions, because those provisions “leave [the agency head and Archivist] no discretion to determine which cases to pursue”) (quoting *Armstrong*, 924 F.2d at 295); *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (*SUWA* test satisfied where the plaintiff “point[ed] to a precise section of the [statute], establishing a specific principle of temporal priority that clearly reins in the agency’s discretion”).

CONCLUSION

The Court should alter or amend its May 24, 2019 Order dismissing Claim One of the FAC with prejudice to a dismissal without prejudice, and grant Plaintiffs leave to file the proposed SAC.

Date: June 14, 2019

Respectfully Submitted,

/s/ Nikhel Sus

NIKHEL S. SUS

(D.C. Bar No. 1017937)

ANNE L. WEISMANN

(D.C. Bar. No. 298190)

Citizens for Responsibility and Ethics in
Washington

1101 K St. NW, Suite 201

Washington, D.C. 20005

Telephone: (202) 408-5565

Fax: (202) 588-5020

nsus@citizensforethics.org

aweismann@citizensforethics.org

MANOJ GOVINDAIAH

Refugee and Immigrant Center for

Education and Legal Services

802 Kentucky Ave.

San Antonio, TX 78201

Telephone: (210) 787-3745

Fax: (210) 787-3745

manoj.govindaiah@raicetexas.org

Counsel for Plaintiffs

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Civil Action No. 18-cv-2473-RC

**SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY
RELIEF**

NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and
Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

Counsel for Plaintiffs

MANOJ GOVINDAIAH
Refugee and Immigrant Center
for Education and Legal Services
1305 N. Flores St.
San Antonio, TX 78212
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicetexas.org

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Plaintiffs Citizens for Responsibility and Ethics in Washington (“CREW”) and Refugee and Immigrant Center for Education and Legal Services, Inc. (“RAICES”) bring this Second Amended Complaint against Defendants U.S. Department of Homeland Security and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security (collectively, “DHS”), alleging as follows:

NATURE OF THE ACTION

1. This is an action for injunctive and declaratory relief under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, challenging DHS’s deficient recordkeeping guidelines and directives, which fail to conform with the Federal Records Act (“FRA”), 44 U.S.C. §§ 2101, *et seq.*

2. DHS’s operative recordkeeping policies, issued in August 2014 and June 2017, lack mandatory guidance regarding the FRA’s records-creation requirements, and thus are facially non-compliant with the FRA. DHS also fails, on information and belief, to provide adequate records management training on these requirements to agency employees.

3. The deficiencies in DHS’s recordkeeping guidelines and directives manifested acutely in its implementation of the Trump Administration’s so-called “zero tolerance” immigration enforcement and family separation policy (“Zero Tolerance Policy”). Rarely, if ever, has a records management failure had such catastrophic consequences: DHS ripped thousands of children away from their families, failed to create adequate documentation of individuals taken into its custody, and, consequently, has been unable to reunify each of the families it separated. As one court has observed, the “unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.” *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018). To make matters worse, DHS political appointees falsely represented to the public DHS’s ability to track the

thousands of migrants harmed by its Zero Tolerance Policy, and ignored repeated concerns raised by career DHS employees about the agency's records management deficiencies during the rollout of Zero Tolerance. DHS also continues, to this day, to separate migrant families at an alarming rate.

4. Even though the family separation crisis has brought to light serious deficiencies with DHS's records management practices, DHS made no changes to its official recordkeeping policies in the wake of the crisis. Moreover, recent reports by the DHS Office of Inspector General ("DHS OIG"), the U.S. Department of Health and Human Services Office of Inspector General ("HHS OIG"), the National Archives and Records Administration ("NARA"), and the U.S. Government Accountability Office ("GAO") indicate that DHS continues to have an agency-wide culture of noncompliance with its FRA obligations.

5. DHS's FRA violations have perceptibly impaired RAICES's ability to fulfill its core mission of providing legal services to migrant families apprehended at the border, causing RAICES to divert substantial resources to counteract that harm. DHS's FRA violations have also deprived Plaintiff CREW of present and future access to documents that CREW is entitled to receive by law, and that CREW requires for its organizational work.

6. This suit therefore requests a declaratory judgment that DHS's recordkeeping guidelines and directives violate the FRA, and injunctive relief compelling DHS to adopt and implement FRA-compliant recordkeeping guidelines and directives that provide adequate guidance regarding the FRA's records-creation requirements.

JURISDICTION AND VENUE

7. This action arises under the APA, 5 U.S.C. §§ 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has personal and subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States).

8. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

9. Plaintiff CREW is a nonprofit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions. CREW researches and reviews agency records created and preserved pursuant to the FRA and made available to the public pursuant to executive branch agency obligations imposed by statutes like the Freedom of Information Act (“FOIA”). CREW disseminates information in a variety of ways, including posting records it has received from its FOIA requests on its website, www.citizensforethics.org, and by writing and publishing reports and blog posts based on those records.

10. Plaintiff RAICES is a nonprofit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code that provides free and low-cost legal services to underserved immigrant children, families, and refugees in Texas. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas, with offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio. RAICES provides consultations, direct legal services, representation, assistance, and advocacy to communities in Texas and to clients after they leave the state.

11. Defendant DHS is an agency within the meaning of the APA, 5 U.S.C. § 701. Among DHS’s component agencies are U.S. Customs and Border Protection (“CBP”) and U.S.

Immigration and Customs Enforcement (“ICE”). DHS operates under the supervision and direction of the Secretary of Homeland Security.

12. Defendant Kevin K. McAleenan is the Acting Secretary of Homeland Security and is sued in his official capacity only. As Acting Secretary of DHS, Mr. McAleenan has an obligation under the FRA to ensure adequate and proper documentation of agency decisions and activities, and to establish adequate recordkeeping guidelines and directives in compliance with the FRA.

LEGAL FRAMEWORK

I. The Federal Records Act

13. The FRA is a collection of statutes that govern the creation, management, and disposal of federal records. *See* 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq.* Among other things, the FRA ensures the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government.” 44 U.S.C. § 2902.

14. Both the Archivist of the United States (the “Archivist”) and the heads of the various executive departments and agencies share responsibility to ensure that an accurate and complete record of their policies and transactions is compiled. *See* 44 U.S.C. §§ 2901, *et seq.*; §§ 3101, *et seq.*

15. The Archivist must “provide guidance and assistance to Federal agencies” and has the responsibility “to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies.” 44 U.S.C. §§ 2904(b), (c)(1). NARA has promulgated regulations governing the creation and maintenance of federal records pursuant to this authority. *See* 36 C.F.R. §§ 1222.22, *et seq.*

16. The head of each executive branch agency “shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions,

procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101.

17. NARA has promulgated regulations implementing the FRA's demands, which provide:

To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

- (a) Document the persons, places, things, or matters dealt with by the agency.
- (b) Facilitate action by agency officials and their successors in office.
- (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
- (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
- (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
- (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

18. The FRA also requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. § 3102. As part of an agency's obligation to develop an FRA-compliant records management program, it must issue recordkeeping guidelines and directives, and provide related training, to its employees.

19. The FRA and its implementing regulations impose detailed and mandatory requirements regarding what an agency must include in its recordkeeping guidelines and directives. Among other things, an agency's recordkeeping requirements must:

- a. “[P]rovide for . . . compliance with” various FRA provisions and implementing regulations, including the records-creation requirements set forth in 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *See* 44 U.S.C. § 3102(4).
- b. “Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties.” 36 C.F.R. § 1222.24(a)(1).
- c. “[I]dentify . . . [t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions.” 36 C.F.R. § 1222.26(a).
- d. Identify “information and documentation that must be included in” the agency's “record series and systems.” 36 C.F.R. § 1222.28(a).
- e. Include “[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.” 36 C.F.R. § 1222.28(d).

20. NARA regulations also require agencies to “[p]rovide guidance and training to all agency personnel on their records management responsibilities, including identification of Federal records, in all formats and media.” 36 C.F.R. § 1220.34(f); *see also id.* § 1222.24(b) (“Agencies must provide the training described in § 1220.34(f) of this subchapter and inform all

employees that they are responsible and accountable for keeping accurate and complete records of their activities.”).

II. The Administrative Procedure Act

21. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

22. The term “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

23. A court reviewing a claim under 5 U.S.C. § 702 “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* §§ 706(1), (2)(A).

24. The “APA authorizes judicial review” of a claim that an agency’s “recordkeeping guidelines and directives are arbitrary and capricious.” *Armstrong v. Bush*, 924 F.2d 282, 297 (D.C. Cir. 1991).

25. In determining whether an agency’s recordkeeping guidelines and directives are arbitrary and capricious, a court reviews the “total ‘guidance’ given to [agency] staff regarding their recordkeeping responsibilities,” including both formal written policies and any “informal, supplementary guidance.” *Armstrong*, 924 F.2d at 297.

RELEVANT FACTS

I. DHS's Deficient Recordkeeping Policies

26. DHS currently operates under at least two formal recordkeeping policies: DHS Directive 141-01, Records and Information Management (issued August 11, 2014), and DHS Instruction 141-01-001, Records and Information Management (issued June 6, 2017). *See* Exhibits 1-2.

27. Both Directive 141-01 and Instruction 141-01-001 fail to provide legally-required guidance on the FRA's records-creation requirements. Specifically, Directive 141-01 and Instruction 141-01-001 do not:

- a. Provide instructions on, or even make reference to, the records-creation requirements set forth in 4 U.S.C. § 3101 and 36 C.F.R. § 1222.22, including the requirements to create records sufficient to (1) “[d]ocument the persons, places, things, or matters dealt with by the agency”; (2) “[f]acilitate action by agency officials and their successors in office”; (3) “[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government”; (4) “[p]rotect the financial, legal, and other rights . . . of persons directly affected by the Governments actions”; (5) “[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically”; and (6) “[d]ocument important board, committee, or staff meetings.” 36 C.F.R. § 1222.22(a)-(f).

- b. “Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties.” 36 C.F.R. § 1222.24(a)(1).
- c. Identify “[t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions.” 36 C.F.R. § 1222.26(a).
- d. Identify specific “information and documentation that must be included in” the agency’s “record series and systems.” 36 C.F.R. § 1222.28(a).
- e. Include “[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.” 36 C.F.R. § 1222.28(d).

28. On information and belief, Directive 141-01 and Instruction 141-01-001 are the only formal policies designed to implement the FRA’s recordkeeping requirements currently in effect at DHS.

29. On information and belief, DHS fails to provide any informal or supplementary guidance to agency employees including adequate guidance on the FRA records-creation requirements outlined above.

30. On information and belief, DHS’s records management training, provided pursuant to 36 C.F.R. § 1220.34(f) and § 1222.24(b), fails to include adequate guidance on the FRA records-creation requirements outlined above.

II. NARA Reports Criticizing DHS's Records Management Practices

31. Reinforcing the inadequacy of the agency's recordkeeping guidelines and directives, DHS and its component agencies have a history of failing to comply with their FRA obligations, which is well documented by NARA. For instance, on January 11, 2017, NARA issued an inspection report regarding DHS's records management program that identified various "issues with the finalization of plans, policies, and procedures at the Department level that should be addressed by . . . senior managers." NARA Records Management Inspection Report, DHS Records Management Program at 18 (Jan. 11, 2017), *available at* <https://www.archives.gov/files/records-mgmt/resources/dhs-2016-inspection.pdf>.¹ Specifically, NARA found that "DHS records management policies, procedures, and strategic plans ha[d] been in draft form for several years" and needed to be "revised, approved, and issued." *Id.* at ii. NARA further found that DHS lacked a "Department-wide strategy for retention scheduling for email records," and that "[c]urrent DHS email use and storage strategies do not allow for effective retention and retrieval of email." *Id.* at ii-iii.

32. DHS's records management deficiencies have manifested in its component agencies as well. For instance, on July 16, 2018, NARA issued a highly critical inspection report regarding CBP's records management system. NARA found that, "[i]n its current state, ***the records management program at CBP is substantially non-compliant with Federal statutes and regulations***, NARA policies, Office of Management and Budget (OMB) Circular A-130, and DHS Records and Information Management policies." NARA Records Management Inspection Report, CBP Records Management Program at 2 (July 16, 2018), *available at*

¹ Although the cover page of this report is dated January 11, 2016, the filename includes the date January 11, 2017, and the report itself discusses events post-dating January 2016.

<https://www.archives.gov/files/records-mgmt/pdf/cbp-2018-inspection.pdf> (“July 2018 NARA Report”) (emphasis added). Specifically, NARA’s report identified the following deficiencies, among others:

- a. “CBP has not assigned records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee the creation and implementation of a comprehensive records management program.” July 2018 NARA Report at 3.
- b. Records management “directives establishing program objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records are out of date or in draft form.” *Id.* at 3-4.
- c. The structure governing its records officers “is not adequately implemented throughout each program to ensure incorporation of recordkeeping requirements and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures.” *Id.* at 4.
- d. “CBP does not integrate records management and recordkeeping requirements into the design, development, and implementation of its electronic systems.” *Id.* at 5.
- e. “CBP does not require records management training for all CBP staff, and the [records management] training it offers does not meet records management training requirements” established by NARA regulations and directives. *Id.* at 6.
- f. CBP “does not conduct regular records management evaluations of agency components.” *Id.* at 7.

- g. “CBP does not identify or manage vital records in accordance with 36 CFR 1223.” *Id.*
- h. “CBP offices are not routinely conducting records inventories.” *Id.* at 8.
- i. “CBP has not established policies and procedures for handling and reporting unauthorized disposals of records to NARA.” *Id.*
- j. “CBP has not developed procedures to conduct exit briefings for departing employees or senior officials.” *Id.*
- k. “CBP has no strategic plan for records management.” *Id.* at 9-10.
- l. “Successful implementation of CBP plans for a Records Management Application and Electronic Records Management System are at risk of failure due to lack of basic records management fundamentals.” *Id.* at 10.

33. Based on these findings, NARA concluded that CBP’s records management program “lacks numerous basic elements of a compliant records management program as prescribed in 36 CFR Chapter XII, Subchapter B.” July 2018 NARA Report at 11. NARA added that it “will require careful strategic planning” for the program “to become effective and compliant in the many areas where it is currently underdeveloped,” noting that “[p]rogram plans and studies to institute [records management] throughout the agency have been formulated since 2015, but limited progress has been made to date.” *Id.* NARA recommended that CBP leadership “begin with developing and implementing a strategic plan for the overall records management program,” and “foster a culture that includes records management in the regular and routine practices of all program functions within the CBP.” *Id.*

34. On information and belief, CBP has failed to take adequate remedial measures in response to NARA’s findings.

III. DHS's Records Management Failures Concerning Migrant Children Apprehended at the Border

A. The Zero Tolerance Policy

35. DHS's woefully deficient recordkeeping guidelines and directives, and overall culture of non-compliance with its FRA obligations, manifested acutely with disastrous results in connection with Zero Tolerance.

36. From July to November 2017, DHS conducted a secret pilot program of the Zero Tolerance Policy in the "El Paso sector," which spans from New Mexico to West Texas.² Under this program, federal prosecutors criminally charged adults who allegedly crossed the border unlawfully in the El Paso sector. If accompanied by a minor child, the child would be separated from the adult. Over 280 migrants were separated under this initiative. Border Patrol ended the program in November 2017.

37. In April 2018, the Trump Administration formally announced the Zero Tolerance Policy. Under the policy, all adults entering the United States illegally would be subject to criminal prosecution. As with the El Paso pilot program, if the apprehended adult was accompanied by a minor child, the child would be separated from the adult.

38. CBP, ICE, and the U.S. Department of Health and Human Services ("HHS") all play critical roles in implementing the Zero Tolerance Policy. CBP's Office of Field Operations ("OFO") inspects foreign visitors and goods entering at established ports of entry, and Border Patrol apprehends individuals who enter the United States between ports of entry. CBP transfers adult migrants in its custody to ICE, which detains certain migrants with pending immigration

² CBP's U.S. Border Patrol ("Border Patrol") divides responsibility for border security operations geographically into sectors.

proceedings and deports migrants who receive final removal orders. Children apprehended at the border who are separated from their parents and reclassified as “Unaccompanied Alien Children” (“Unaccompanied Children”) are held in DHS custody until they can be transferred to HHS’s Office of Refugee Resettlement.³

39. The Zero Tolerance Policy fundamentally changed DHS’s approach to immigration enforcement. Under prior policy, when CBP apprehended a migrant family unit attempting to enter the United States illegally, it usually placed the adult in civil immigration proceedings without referring the adult for criminal prosecution. CBP only separated apprehended parents from children in limited circumstances, such as where the adult had a criminal history or outstanding warrant, or if CBP could not determine whether the adult was the child’s parent or legal guardian.

B. Fallout from Zero Tolerance

40. The fallout from the Zero Tolerance Policy was catastrophic, resulting in thousands of children being ripped from their families.

41. Following massive public outcry, President Trump purportedly halted family separations by an Executive Order issued June 20, 2018. *See* Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 25, 2018) (“EO 13841”). EO 13841 states that the Trump Administration will continue to criminally prosecute illegal entry offenses, but that the Secretary of Homeland Security “shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or

³ “Unaccompanied Alien Child” is defined by statute as one who (1) “has no lawful immigration status in the United States,” (2) “has not attained 18 years of age,” and (3) “has no parent or legal guardian in the United States; or no parent or legal guardian . . . in the United States available to provide care and physical custody.” 6 U.S.C. § 279(g)(2).

immigration proceedings involving their members.” *Id.* It adds that the “Secretary shall not, however, detain an alien family together when there is a concern that detention of an alien child with the child’s alien parent would pose a risk to the child’s welfare.” *Id.* The EO’s definition of “alien family” is limited to children and adults who have “a legal parent-child relationship.” *Id.* Thus, the EO does not prevent DHS from separating children from adults who are not parents or legal guardians, such as non-guardian grandparents, siblings, and other family members. Nor does EO 13841 address reunification of the thousands of children DHS had already separated.

42. Three days after the issuance of EO 13841, DHS released a “Fact Sheet” on June 23, 2018, outlining the government’s efforts to “ensure that those adults who are subject to removal are reunited with their children for the purposes of removal.” DHS Fact Sheet: Zero-Tolerance Prosecution and Family Reunification, *available at* <https://bit.ly/2K6QRpm>. The fact sheet stated that “[m]inors come into HHS custody with information provided by DHS regarding how they illegally entered the country and whether or not they were with a parent or adult and, to the extent possible, the parent(s) or guardian(s) information and location. There is a central database which HHS and DHS can access and update when a parent(s) or minor(s) location information changes.” *Id.*

43. By order dated June 26, 2018, the U.S. District Court for the Southern District of California entered a preliminary injunction requiring DHS and HHS to reunify a certified class of migrant parents and their separated children within 30 days (an order that still has not been fulfilled to this day). *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). In so holding, the court noted that DHS’s “practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their

parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence.” *Id.* at 1144. The “unfortunate reality,” the court explained, “is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.” *Id.*

44. By order dated October 9, 2018, the court approved a class settlement in *Ms. L* and a related case. *Ms. L. v. ICE*, No. 18-cv-428, ECF No. 256 (S.D. Cal. Oct. 9, 2018). Like EO 13841, the *Ms. L* class settlement only applies to parent-child separations, and not to separations of children from adults who are not the child’s parents or legal guardians. The class definition also expressly excludes “alien parents with criminal histories or a communicable disease, or those encountered in the interior of the United States.” *Id.*

C. DHS’s Records Management Failures During Zero Tolerance

45. During the government’s family reunification efforts, DHS’s systematic recordkeeping failures—which stem from the agency’s woefully deficient recordkeeping guidelines and directives—became readily apparent. These failures are thoroughly documented in a series of reports issued by the DHS OIG, HHS OIG, and GAO, which make several troubling findings that are outlined below.

46. Before Zero Tolerance, “DHS and HHS data systems did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and . . . such information was not always provided [to HHS] when children were transferred from DHS to HHS custody.” GAO Report, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, at 16 (Oct. 2018), available at

<https://www.gao.gov/assets/700/694918.pdf> (“GAO Report”). Rather, DHS historically provided only anecdotal information about its separation of children to HHS on a discretionary, *ad hoc* basis by transmitting the information into the child’s record on HHS’s Unaccompanied Children Portal, and did not track separations of children in an aggregated manner. Thus, when the *Ms. L* court issued its orders on June 26, 2018, there was not an aggregated list of the children who had been separated by DHS and were then in HHS care.

47. Relatedly, contrary to DHS’s public claims that DHS and HHS had a “central database” with up-to-date information regarding family separations, the DHS OIG found “no evidence that such a database exists,” and noted that DHS eventually “acknowledged to the OIG that there is no ‘direct electronic interface’ between DHS and HHS tracking systems.” DHS OIG Report, *Special Review – Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy*, OIG-18-84, at 2-3, 11 (Sept. 27, 2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> (“DHS OIG Report”); HHS OIG Issue Brief, *Separated Children Placed in Office of Refugee Resettlement Care*, OEI-BL-18-00511, at 5 (Jan. 2019), available at <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (“HHS OIG Report”); GAO Report at 23.

48. CBP officials told the DHS OIG that they “could not feasibly identify children who were separated before . . . April 19, 2018,” DHS OIG Report at 11 n.23, indicating that the agency failed altogether to create records documenting those separations. This would include the hundreds of migrant families separated during the El Paso pilot program.

49. There was also poor integration of recordkeeping systems internally within DHS, and externally between DHS and HHS. Internally, “ICE’s system did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child. . .

. As a result, ICE officers at the Port Isabel Detention Center stated that when processing detainees for removal, officials initially treated separated adults the same as other detainees and made no additional effort to identify and reunite families prior to removal.” DHS OIG Report at 9-10. Externally, CBP did not have a uniform, reliable system for creating records documenting family separations and transmitting them to HHS. CBP officers would instead “manually enter information into a Microsoft Word document, which they then send to HHS as an email attachment. Each step of this manual process is vulnerable to human error, increasing the risk that a child could become lost in the system.” *Id.* at 10.

50. CBP does not create records documenting the information it transmits to HHS regarding children transferred to its custody. DHS OIG Report at 10 n.21. CBP told the OIG “it does not store that data and therefore could not provide it to the OIG team.” *Id.*

51. Several current and former DHS officials have provided detailed, insider accounts of DHS’s disastrous implementation of the Zero Tolerance Policy. One such former official is Scott Shuchart, who served as a senior adviser at DHS’s Office for Civil Rights and Civil Liberties from 2010 to July 2018. In an October 25, 2018 *Washington Post* article, Shuchart made the troubling revelation that career DHS employees repeatedly raised concerns about the agency’s records management deficiencies during the rollout of the Zero Tolerance Policy, but that political appointees simply ignored those concerns. *See* Scott Shuchart, Careless cruelty: Civil servants said separating families was illegal. The administration ignored us, *Wash. Post.*, Oct. 25, 2018, available at <https://wapo.st/2yAjNy1>. Specifically, Shuchart stated:

- a. “[M]y colleagues and I were pushing for record-keeping, communication and other policies that Trump appointees ignored.” *Id.*

- b. Career employees “noticed early that CBP and ICE weren’t providing HHS with proper records to allow families to be reunited or pursue their immigration cases jointly. . . . [W]e tried to ring the alarm that the legal, strategic and human dimensions of the policy hadn’t been thought through, needed fast improvement and posed a massive liability for the government.” *Id.*
- c. “Every attempt to raise civil rights concerns led nowhere. . . . Civil servants advanced recommendations for mitigating the worst of the harm,” including “improving record-keeping,” and “giving separated parents and children better information,” all to no avail. *Id.*
- d. Career employees asked agency leadership if “officials in Washington directed agents to record family members’ names and information, so they could later be reunited?” and were told blithely “I think we sent an email.” *Id.* Agency leadership ignored the career employees’ requests to see the purported email. *Id.*

52. Shuchart reiterated these points in a November 26, 2018 interview with *60 Minutes*, stating that the Zero Tolerance Policy “bypassed the usual review” process, which would have entailed consulting his office; that his office would have insisted “on the recordkeeping that needed to be done” had it been consulted; and that when his office “tried to provide” that advice, “it was ignored.” Scott Pelley, [The Chaos Behind Donald Trump’s Policy of Family Separation at the Border](https://cbsn.ws/2P604fn), *60 Minutes*, Nov. 26, 2018, available at <https://cbsn.ws/2P604fn>.

53. DHS's failure to create adequate records in the first instance significantly impaired the government's efforts to reunify separated families in accordance with the *Ms. L* order. Because "no centralized system existed to identify, track, or connect families separated by DHS," complying with the *Ms. L* order "required HHS and DHS to undertake a significant new effort to rapidly identify children in [HHS] care who had been separated from their parents and reunify them." HHS OIG Report at 5. This forensic data analysis entailed (1) "min[ing] more than 60 DHS and HHS databases to identify indicators of possible separation, such as an adult and child with the same last name apprehended on the same day at the same location"; (2) "manually review[ing] case files for all of the approximately 12,000 children in [HHS] care at that time"; and (3) asking all HHS-funded "shelters to attest to any separated children that grantees reasonably believed to be in their care." *Id.* at 7. HHS has described its efforts as "herculean," "complex, fast-moving, and resource-intensive." *Id.* at 19.

54. DHS's recordkeeping failures have also impeded OIG investigations. For instance, DHS could not fulfill the OIG's request for a "list of every alien child separated from an adult since April 19, 2018, as well as basic information about each child, including the child's date of birth; the child's date of apprehension, separation, and (if applicable) reunification; and the location(s) in which the child was held while in DHS custody." DHS OIG Report at 11. DHS "struggled" to provide the OIG with "accurate, complete, reliable data on family separations and reunifications," and the data DHS did provide "was incomplete and inconsistent, raising questions about its reliability." *Id.* at 9, 11.

D. DHS's Ongoing Child Separation Practices and Related Recordkeeping Failures

55. Despite the Trump Administration's supposed cessation of family separations in June 2018, DHS continues to separate families at an alarming rate. As of February 2019, the

government revealed that it had separated at least 245 children from their parents following the *Ms. L* court's June 2018 order. *See* Joint Status Report, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 360, at 11 (S.D. Cal. filed Feb. 20, 2019). The government claims that 225 of these separations were based on alleged “[p]arent criminality, prosecution, gang affiliation, or other law enforcement purpose,” and thus fall outside the *Ms. L* class settlement. *Id.* at 13.

56. It has been widely reported that DHS is abusing the exceptions to the *Ms. L* class settlement, and routinely separating families without creating records documenting the purported grounds for the separation.⁴ These observations are consistent with the firsthand experience of Plaintiff RAICES.

57. In addition to parent-child separations, DHS continues to routinely separate children from *non-parental adults* with whom the child was apprehended at the border, including adult relatives such as grandparents, aunts, uncles, and older siblings (“Non-Parental Separations”). DHS carries out these separations even where the adult is the child’s sole caretaker and *de facto* custodian. DHS takes the position that under the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Pub. L. No. 110-457, 122 Stat. 5044 (2008), it must classify migrant children apprehended with non-parental adults as Unaccompanied Children, and transfer the child to HHS custody. Thus, in contrast to parental separations, Non-Parental Separations are the rule rather than the exception.

⁴ *See* Alan Gomez, [Despite ban, separating migrant families at the border continues in some cases](https://bit.ly/2GDKN5l), *USA Today*, Feb. 21, 2019, available at <https://bit.ly/2GDKN5l>; Statement of Jennifer Podkul, Kids in Need of Defense, U.S. House Comm. On Energy & Commerce, at 7 (Feb. 7, 2019), available at <https://bit.ly/2EpZjeT>; Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 10-15 (Feb. 2019), available at <https://bit.ly/2STfyd7>; Ginger Thompson, [Families Are Still Being Separated at the Border, Months After “Zero Tolerance” Was Reversed](https://bit.ly/2zxD3gb), *ProPublica*, Nov. 27, 2018, available at <https://bit.ly/2zxD3gb>.

58. Critically, DHS has a *de facto* policy of categorically *not* creating records documenting Non-Parental Separations, and affirmatively disclaims any legal obligation to create such records. Insofar as DHS has taken any steps to improve recordkeeping concerning child separations (which are themselves inadequate), those efforts solely concern *parental* separations. This reflects DHS’s singular focus on the *Ms. L* class settlement, which is limited to parental separations.

59. Due to DHS’s *de facto* policy of not creating records documenting Non-Parental Separations, DHS lacks any records from which separated children and adults may be readily linked, or data from which the total number of Non-Parental Separations may be ascertained. Rather, for purposes of DHS’s records, an apprehended child who entered the country alone is indistinguishable from a child who entered the country accompanied by an adult relative—both would be classified as an Unaccompanied Child and transferred to HHS custody.

60. One immigrant rights group, the Texas Civil Rights Project, has interviewed 234 individuals who were subject to Non-Parental Separations, the majority of which were “siblings who traveled together due to violence and insecurity in their home countries.” Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 15 (Feb. 2019), available at <https://bit.ly/2STfyd7>. “For many of these siblings, the adult sibling is under the age of 21 and traumatized by the separation.” *Id.* “For grandparents traveling with their grandchildren, they are often the sole provider for the grandchildren.” *Id.* “Aunts and uncles have similar relationships with their nieces and nephews, often taking the arduous journey with the child because the parents are either under threat of violence or have died due to violence in their home region.” *Id.* These

observations are consistent with the firsthand experience of Plaintiff RAICES, outlined below in paragraphs 62-68.

61. Even though the family separation crisis brought to light serious deficiencies with DHS's records management practices, DHS made no changes to its official recordkeeping policies in the wake of the crisis. Indeed, Directive 141-01 and Instruction 141-01-001 were issued, respectively, in August 2014 and June 2017, and remain unchanged to this day.

IV. Plaintiffs' Injuries

62. Plaintiff RAICES's mission is to provide effective, free and low-cost legal services to underserved immigrant children, families, and refugees in Texas. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas, with offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio. To further its mission, RAICES provides consultations, direct legal services, representation, assistance, and advocacy to communities in Texas and to clients after they leave the state. RAICES has provided legal representation and services to hundreds of migrant families forcibly separated by DHS.

63. DHS's deficient recordkeeping guidelines and directives, and resulting recordkeeping failures, have perceptibly impaired RAICES's efforts to provide legal services to separated migrant families—in direct conflict with its mission—and required RAICES to devote substantial resources to counteract that harm. To understand this impact, context is crucial. Because the migrant families with whom RAICES works are exceedingly vulnerable, have limited means, and are entangled in the complex machinery of the immigration process, RAICES often must rely on records or information supplied by the government in representing its clients.

As a result, DHS's FRA violations have impeded, and continue to impede, RAICES's core functions in several respects.

64. First, when DHS separates migrant children from adult companions (including not only parents, but other adult relatives or caretakers) and fails to create records sufficient to later identify and locate those adults, RAICES's representation of those children is frustrated. That is because migrant children apprehended at the border often lack information about family or potential sponsors in the United States to whom HHS might release the child; knowledge of the reasons why the family fled their home country that may support a potential asylum case, as well as documents or evidence supporting such a case; and the communicational abilities to fully protect their interests. Typically, it is the separated adult companion who possesses any documents or information that are vital to RAICES's representation of the child. So, when DHS fails to create records from which such a separated adult companion can be readily located, it impedes RAICES's ability to, among other things, prepare applications for relief and obtain evidence for the children it represents in removal proceedings.

65. Second, DHS's recordkeeping failures also impair RAICES's ability to timely refer detained Unaccompanied Children to federal foster care. In making these referrals, RAICES is typically required to corroborate certain facts provided by the child with an adult relative, preferably a parent. But in numerous cases, DHS's poor recordkeeping has prevented or delayed RAICES's efforts to locate a knowledgeable adult who can provide such corroboration, which delays the entire referral process.

66. Third, DHS's recordkeeping failures also complicate RAICES's efforts to comply with certain grant requirements. RAICES receives federal funding from HHS to provide legal services to Unaccompanied Children. In turn, RAICES is expected to provide "know your

rights” presentations and intakes to all Unaccompanied Children within a certain number of days after their arrival at an HHS detention center. When working with children under 13, it is nearly impossible to accurately complete an intake without support or assistance from a parent or adult relative. Here again, DHS’s failure to create adequate records from which such adults can be readily identified has complicated RAICES’s ability to complete this essential task.

67. Fourth, DHS’s recordkeeping failures and attendant delay in the release of Unaccompanied Children from HHS custody has led to an increase in removal proceedings against detained migrant children. This is critical because removal proceedings for *detained* Unaccompanied Children are demonstrably more difficult than they are for *released* Unaccompanied Children, as detained children undergo the proceeding without the support of their family, and, since they are detained at government expense, the immigration court process happens quickly, usually within just a few weeks. The increase in such proceedings has correspondingly increased RAICES’s workload and required it to reallocate resources.

68. Fifth, DHS’s systematic recordkeeping failures have required RAICES to invest in and implement its own programs and initiatives to assist separated migrant families—all in an attempt to fill the void left by DHS’s noncompliance with the FRA. These include two new tools, launched in July 2018, to help “match” separated family members: the National Families Together Hotline and the Separated Parents Intake database. The National Families Together Hotline allows members of the public to call RAICES and seek assistance with locating their loved ones inside of DHS’s detention system. The Separated Parents Intake database allows lawyers working with separated children to seek assistance in locating their clients’ parents who are detained by DHS. Between July 2018 and March 2019, RAICES received over 1,350 calls to the National Families Together Hotline, and inquiries on over 600 separated parents through the

Separated Parents Intake database. To run and maintain these new resources, RAICES diverted its staff away from their existing work so that they could create new systems, train volunteers, and maintain data. RAICES has therefore devoted significant time and resources to these new efforts, which would not have been required if DHS had fulfilled its FRA obligations and created adequate records in the first place.

69. Plaintiff CREW has also been, and continues to be, harmed by DHS's FRA violations. CREW's mission is to protect the right of citizens to be informed about the activities of government officials and to ensure the integrity of government officials. To further its mission, CREW frequently files FOIA requests, and disseminates the documents it receives through these requests on its website, www.citizensforethics.org, and on social media, and uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public.

70. As a frequent FOIA requester, CREW has a unique operational interest in agencies' compliance with the FRA, because when an agency fails to create records documenting its functions, policies, decisions, procedures, and essential transactions in compliance with the FRA, CREW's FOIA requests yield fewer or no responsive documents. Deprivation of these records frustrates CREW's ability to fulfill its organizational objectives, including its goal of shedding light on the formulation and implementation of agency policies, and to educate the public about those activities.

71. CREW has a particularly strong interest in DHS records, including records documenting the agency's functions, policies, decisions, procedures, and essential transactions, as well as records relating to child separations. Since January 2017, CREW has submitted 24 separate FOIA requests to DHS, many of which remain outstanding. Two of those pending

requests seek various categories of documents relating to DHS's child separation practices, and related policies and procedures. CREW seeks these documents to determine what official policies or procedures, if any, the agency adopted relating to child separations; to shed light on the serious deficiencies in DHS's record management practices documented in the DHS OIG's September 2018 report; and to assess whether DHS possesses critical data relating to child separations that it should possess if it were complying with the FRA.

72. CREW will continue to submit FOIA requests to DHS, and other agencies, on matters relating to CREW's ongoing research, litigation, advocacy, and public education efforts, and therefore has a continuing interest in DHS's compliance with the FRA.

73. As outlined above, due to DHS's deficient recordkeeping guidelines and directives, DHS has failed and continues to fail to create records in compliance with the FRA, including records that would be responsive to CREW's pending FOIA requests and requests CREW plans to submit in the future. Consequently, CREW's current and future FOIA requests will yield fewer or no responsive documents, depriving CREW of critical documents and information that it needs to fulfill its mission.

PLAINTIFFS' CLAIM FOR RELIEF

DHS's Recordkeeping Guidelines and Directives Violate the FRA and the APA (Declaratory and Injunctive Relief)

74. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

75. The FRA requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. § 3102. As part of an agency's obligation to develop an FRA-compliant records management program, it must issue recordkeeping guidelines and directives, and provide related training, to its employees.

76. As detailed above in paragraphs 18-20, the FRA and its implementing regulations impose detailed and mandatory requirements regarding what an agency must include in its recordkeeping guidelines and directives, and related training it must provide its employees.

77. DHS's operative recordkeeping policies, Directive 141-01 and Instruction 141-01-001, *see* Exhibits 1-2, fail to comply with the FRA because they lack adequate guidance regarding the FRA's records-creation requirements. Specifically, Directive 141-01 and Instruction 141-01-001 do not:

- a. Provide instructions on, or even make reference to, the records-creation requirements set forth in 4 U.S.C. § 3101 and 36 C.F.R. § 1222.22, including the requirements to create records sufficient to (1) “[d]ocument the persons, places, things, or matters dealt with by the agency”; (2) “[f]acilitate action by agency officials and their successors in office”; (3) “[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government”; (4) “[p]rotect the financial, legal, and other rights . . . of persons directly affected by the Governments actions”; (5) “[d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically”; and (6) “[d]ocument important board, committee, or staff meetings.” 36 C.F.R. § 1222.22(a)-(f).
- b. “Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties.” 36 C.F.R. § 1222.24(a)(1).

- c. Identify “[t]he record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions.” 36 C.F.R. § 1222.26(a).
- d. Identify specific “information and documentation that must be included in” the agency’s “record series and systems.” 36 C.F.R. § 1222.28(a).
- e. Include “[p]olicies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities.” 36 C.F.R. § 1222.28(d).

78. On information and belief, Directive 141-01 and Instruction 141-01-001 are the only formal policies designed to implement the FRA’s recordkeeping requirements currently in effect at DHS.

79. On information and belief, DHS fails to provide any informal or supplementary guidance to agency employees including adequate guidance on the FRA records-creation requirements outlined above.

80. On information and belief, DHS’s records management training, provided pursuant to 36 C.F.R. § 1220.34(f) and § 1222.24(b), fails to include adequate guidance on the FRA records-creation requirements outlined above.

81. Accordingly, DHS’s recordkeeping guidelines and directives—consisting of the total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal—fail to comply with the FRA and its implementing regulations. DHS’s recordkeeping guidelines and directives are therefore “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

82. DHS's unlawful actions have perceptibly impaired RAICES's ability to fulfill its core mission of providing legal services to migrant families, causing RAICES to divert substantial resources to counteract that harm.

83. DHS's unlawful actions have deprived Plaintiff CREW of present and future access to documents that CREW is entitled to receive by law; that would shed light on DHS's functions, policies, decisions, procedures, and essential transactions; and that CREW needs for its organizational work.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that DHS's recordkeeping guidelines and directives—consisting of the total guidance given to agency employees regarding their recordkeeping responsibilities, both formal and informal—fail to provide adequate guidance on the FRA's records-creation requirements in violation of the FRA, and are therefore arbitrary, capricious, or otherwise not in accordance with law.
2. Issue injunctive relief compelling DHS to adopt and implement revised recordkeeping guidelines and directives that provide adequate guidance regarding FRA's records-creation requirements in compliance with the FRA.
3. Award Plaintiffs their costs and reasonable attorneys' fees in this action; and
4. Grant such other and further relief as the Court may deem just and proper.

Date: June 14, 2019

Respectfully Submitted,

/s/ Nikhel Sus

NIKHEL S. SUS

(D.C. Bar No. 1017937)

ANNE L. WEISMANN

(D.C. Bar. No. 298190)

Citizens for Responsibility and Ethics in
Washington

1101 K St. NW, Suite 201

Washington, D.C. 20005

Telephone: (202) 408-5565

Fax: (202) 588-5020

nsus@citizensforethics.org

aweismann@citizensforethics.org

MANOJ GOVINDAIAH

Refugee and Immigrant Center for Education and
Legal Services

1305 N. Flores St.

San Antonio, TX 78212

Telephone: (210) 787-3745

Fax: (210) 787-3745

manoj.govindaiah@raicetexas.org

Counsel for Plaintiffs

Exhibit 1

Department of Homeland Security
DHS Directives System
Directive Number: 141-01
Revision Number: 01
Issue Date: 8/11/2014

RECORDS AND INFORMATION MANAGEMENT

I. Purpose

This Directive establishes the Department of Homeland Security (DHS) Records and Information Management (RIM) Program and sets forth the policies for managing records regardless of medium, lifecycle stage, or environment.

II. Scope

This Directive applies throughout DHS. It applies to Federal records, non-records used for reference, and personal records. Each Component may augment this Directive with more specific internal policies and procedures that are in alignment with DHS policy.

III. Authorities

- A. Title 44, United States Code (U.S.C.), Chapter 21, "National Archives and Records Administration," Chapter 29, "Records Management by the Archivist of the United States and by the Administrator of General Services," Chapter 31, "Records Management by Federal Agencies," Chapter 33, "Disposal of Records," Chapter 35, "Coordination of Federal Information Policy," and Chapter 36, "Management and Promotion of Electronic Government Services"
- B. Title 36, Code of Federal Regulations (CFR), Chapter XII, Subchapter B, "Records Management"
- C. Title 41, CFR, Subtitle C, Chapter 102, "Creation, Maintenance, and Use of Records"
- D. Office of Management and Budget (OMB) / National Archives and Records Administration (NARA) Memorandum M-12-18, "Managing Government Records Directive"
- E. DHS Delegation 04000, "Delegation for Information Technology"

IV. Responsibilities

A. Senior Agency Official:

1. Ensures that the Department efficiently and appropriately complies with all applicable records management statutes, regulations, and NARA policies.
2. Makes adjustments to practices, personnel, and funding as may be necessary to ensure records management compliance and support the business needs of the Department.

B. Chief Information Officer (CIO):

1. Establishes and oversees the RIM Program throughout the Department.
2. Appoints an official as the Chief Records Officer to lead and manage a Department-wide RIM Program.
3. Establishes RIM qualification requirements and training throughout the Department.
4. Provides for the seamless capture and storage of electronic records and associated metadata in DHS enterprise-wide systems and applications.
5. Ensures that records management and archival functions are addressed in the requirements development phase for the design, development, and implementation of new or significantly revised information systems.
6. Assists OMB in the performance of its functions assigned under the E-Government Act of 2002.
7. Ensures that system administrators do not disconnect or delete electronic mail stores and personal network drives or personal desktops and any other storable information technology (IT) device of departing personnel until proper receipt.

C. Chief Human Capital Officer (CHCO):

1. Ensures RIM training is included as a component of the in-processing procedures for all DHS personnel.

2. Facilitates annual RIM training (as developed by the Chief Records Officer) for all DHS personnel.

3. Ensure that confirmation of records custodial transfer is received prior to out-processing of the departing personnel.

D. The **General Counsel, Office of the** provides notice to the CIO and other appropriate officials of the need to suspend records disposition requirements for litigation, Congressional inquiries, etc. and when suspensions have been lifted.

E. **Chief Privacy Officer:**

1. Establishes the policies for, and oversees, proper handling of record and non-record material containing Personally Identifiable Information (PII).

2. Examines new or updated records systems for privacy considerations.

3. Coordinates with the CIO to determine the requirements necessary to facilitate timely and accurate searches for Freedom of Information Act (FOIA) requests.

F. **Component heads:**

1. Implement the DHS RIM Program within their Components.

2. Designate a Chief Records Officer for the Component, who manages the RIM Program in accordance with this Directive and ensures proper records officials (records liaisons or custodians) are identified.

3. Obtain Component specific records retention schedules (via the Component Chief Records Officer) for all records within the Component.

4. Incorporate requirements for annual records training into contracts, as appropriate.

G. **Records Management Policy Working Group (RMPWG):**

1. Advises the CIO on RIM policy impact and effectiveness.

2. Provides recommendations to integrate functional policies and practices throughout the Department.

3. Is managed and led by the Chief Records Officer.

4. Members include representatives from across the Department, as determined by the Chief Records Officer.

H. **Records Leadership Council (RLC):**

1. Advises the CIO on DHS-wide RIM policies and procedures.
2. Provides recommendations on requirements, standards, and practices for the DHS-wide RIM program.
3. Provides recommendations to the CIO on records management governance requirements for IT systems and records management activities, accomplishments, and risks within DHS.
4. Members include authorized representatives from OCIO's Records and Information Management Program Office, each Operational Component, and the Federal Law Enforcement Training Center.

V. Policy and Requirements

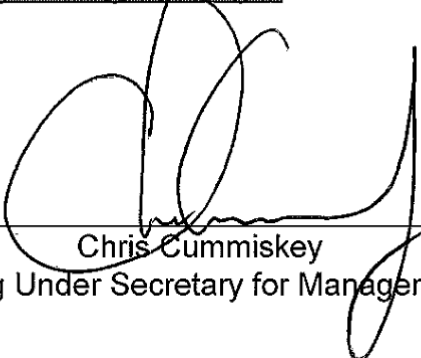
It is DHS policy to preserve all records in accordance with applicable statutory requirements that leverages economic advantages and provides a common basis among all Components. The Department has established the following requirements for all DHS employees.

- A. Create, receive, and maintain official records providing adequate and proper documentation in support of DHS activities (Title 44, U.S.C., Section 3301).
 1. Non-records are not retained beyond the usefulness of the records or when no longer needed for reference and should be kept separate from official DHS records.
 2. Keep personal records to a minimum and separate from official DHS records. Personal files are excluded from the definition of Federal records and are not owned by the Government.
- B. Ensure all records are properly maintained in all programs, projects, and administration efforts).
- C. Print electronic records, including metadata, and file them in a paper records keeping system. If an Electronic Records Management System (ERMS) is available, file records in accordance with the requirements of that system.
- D. Maintain records according to a designated DHS file plan, which allows for retrieval across the varied DHS missions.

- E. Provide appropriate training to new employees and annual training to current employees to ensure awareness of their responsibilities to maintain and safeguard DHS records.
- F. Establish appropriate out-processing for departing employees and ensure that the program or process is established to review and adjudicate requests for the removal of records.
- G. Create and/or Implement Record Schedules:
 - 1. Where acceptable, apply the General Records Schedules (GRS), as approved by the National Archives and Records Administration.
 - 2. For mission related records, follow the instructions for disposition of records as specified by the approved DHS, Component, or Enterprise Records Schedule and dispose of as authorized by that schedule.
 - 3. In the absence of a Record Schedule, create DHS, Component, or Enterprise Record Schedules which specify disposition instructions for unscheduled records and submit to the National Archives and Records Administration for approval by the Archivist of the United States.
- H. Implement a Vital Records Program.
- I. Evaluate annually the RIM Program, including records disposition, responsibilities, training, and records maintenance.

VI. Questions

Address questions regarding this Directive to the Office of the Chief Information Officer, Records and Information Management Program Office at dhsrecordsmanagement@hq.dhs.gov.


Chris Cumiskey
Acting Under Secretary for Management

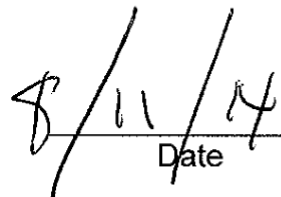

Date

Exhibit 2

Department of Homeland Security
DHS Directives System
Instruction Number: 141-01-001
Revision Number: 00
Issue Date: 06/08/2017

RECORDS AND INFORMATION MANAGEMENT

I. Purpose

This Instruction implements the Department of Homeland Security (DHS) Directive 141-01, Records and Information Management.

II. Scope

This Instruction applies throughout DHS to all records of the Department, as defined in the Federal Records Act, regardless of medium, which are created, collected, processed, used, stored and/or destroyed by DHS. Each Component is authorized to develop and implement more specific policies and procedures consistent and compatible with this Departmental Instruction and DHS policy.

III. References

- A. Title 5, United States Code (U.S.C.), Chapter 5, Subchapter II – “Administrative Procedure”
 - 1. § 552. “Public information; agency rules, opinions, orders, records, and proceedings” [“Freedom of Information Act,” as amended]
 - 2. § 552a. “Records maintained on individuals” [“Privacy Act of 1974,” as amended]
 - 3. § 553. “Rule making”
- B. Title 18, U.S.C., Chapter 101, “Records and Reports”
- C. Title 18, U.S.C., Chapter 121, “Stored Wire and Electronic Communications Transactional Records Access”
- D. Title 40, U.S.C. Subtitle III, “Information Technology Management”
- E. Title 5, Code of Federal Regulations (CFR), Part 1320, “Controlling Paperwork Burdens on the Public”

- F. DHS Management Directive 047-01, "Privacy Policy and Compliance"
- G. DHS Directive 140-06 and Instruction 140-06-001, "Privacy Policy for Research Programs and Projects"
- H. DHS Directive 123-05, "Telework Directive"
- I. DHS Instruction 047-01-001, "Privacy Policy and Compliance"
- J. Federal Continuity Directive (FCD) 1, "Federal Executive Branch National Continuity Program and Requirements," October 2012
- K. FCD 2, "Federal Executive Branch Mission Essential Function and Primary Mission Essential Function Identification," July 2013

IV. Definitions

A. "**Records Schedules**" or "**schedule**": Identifies records as either temporary or permanent. All records schedules are approved by the National Archives and Records Administration (NARA). A records schedule provides mandatory instructions for the disposition of records (including the transfer of permanent records and disposal of temporary records) when the records are no longer needed by the agency. As part of the ongoing records life cycle, disposition should occur in the normal course of agency business. All Federal records are scheduled (44 U.S.C. 3303) either by an agency schedule or a General Records Schedule (GRS). A schedule can be (a) a Standard Form (SF) 115, "Request for Records Disposition Authority" that has been approved by NARA to authorize the disposition of Federal records; (b) a GRS issued by NARA; or (c) a printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or in the GRS.

1. **GRS**: The Archivist of the United States issues GRS to provide disposal authorization for temporary administrative records common to several or all agencies of the Federal Government. These include records relating to civilian personnel, fiscal accounting, procurement, communications, printing, other common functions, and certain non-textual records. Use of the GRS is mandatory under 44 U.S.C. 3303a, so DHS requests authority from NARA prior to deviating from the disposition instructions prescribed in the General Records Schedules in accordance with 36 CFR 1225.22(c).

2. **Agency Records Schedules:** All Federal agencies are required by law to develop records schedules for all records not covered by the GRS (44 U.S.C. 3303). Agencies submit the schedules for NARA approval on an SF 115. The SF 115 contains descriptions of record series or systems and disposition instructions for each. These instructions specify when the series is to be cut off, when eligible temporary records are to be destroyed or deleted, and when permanent records are to be transferred to NARA. The Office of the Secretary and DHS Components fulfill these requirements through two primary instruments:

a. Enterprise Records Schedules: Schedules which provide disposition authorization for records common to multiple DHS Components, which are not already covered by the GRS.

b. Component Records Schedules: Schedules which provide disposition authorization for program records unique to a single DHS Component, which are not already covered by the GRS or an Enterprise Records Schedule.

B. **Schedule Approval:** NARA approves a schedule before it can be implemented. This approval authorizes and makes mandatory the retention periods contained in the schedule as well as the disposition instructions to be carried out upon expiration of the prescribed retention period. Some schedules, especially those containing records relating to financial management, claims, and other related matters, are also approved by the Government Accountability Office (44 U.S.C. 3309) before NARA approves the schedule.

C. **Schedule Guide:** A schedule guide is a printed agency manual or directive containing descriptions of and disposition instructions for all documentary materials, record and non-record, created by a Federal agency or major component of an executive department. Unless taken from the GRS, the disposition instructions for agency records are approved by NARA on one or more SF 115s prior to issuance by the agency. The disposition instructions for the non-record material are established by the agency and do not require NARA approval.

D. **Enterprise Scheduling**: The coordinated, enterprise-level submission of records disposition requests to NARA for common functions across the Department. The process for creating an enterprise schedule requires the Records Management Program Office to research existing DHS-wide and Component-specific schedules to ascertain the presence of specific classes of records, desired/required retention periods, and the existence of current disposition authority. The Records Management Program Office also vets the draft schedule through the Component Records Management Offices; and submits the schedule to NARA for approval. Component Records Offices vet the schedule through the appropriate program area. Once the schedule is approved by NARA, it obviates the need to create a Component-specific schedule.

E. **File Plan**: A list of records in a specific office that describes how the records are organized and maintained. DHS adopted the Federal Enterprise Architecture (FEA) Business Reference Model (BRM) as basis for the Department-wide uniform file plan. The BRM provides an organized, hierarchical construct for describing the day-to-day business operations of the Federal Government using a functionally driven (not organizational) approach.

F. **Nonrecord materials**: Are those Federally owned informational materials that do not meet the statutory definition of records (44 U.S.C. 3301) or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of blank forms or publications, or documents that provide no evidence of agency functions and activities.

G. **Personal files** (also called **Personal Papers**): Are documentary materials belonging to an individual that are not used to conduct agency business. Personal files are excluded from the definition of Federal records and are not owned by the Government.

H. **Records** or **Federal records**: Is defined in 44 U.S.C. 3301 as including “all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them (44 U.S.C. 3301).

I. **Telework**: Any arrangement in which an employee regularly performs officially assigned duties at home or other worksites geographically convenient to the residence of the employee and away from the traditional worksite.

V. Responsibilities

A. Chief Records Officer:

1. Serves as the Department's leader on Records and Information Management (RIM) related matters and is the agency representative to NARA, other departments, and agencies;
2. Ensures annual RIM training, in coordination with the Chief Human Capital Officer, is current and compliant with DHS requirements;
3. Facilitates RIM training as part of DHS-wide personnel in-processing procedures;
4. Leads, oversees, develops, coordinates, and implements the Department's RIM policy and procedures to include vital records management and NARA approval for all systems and program schedules throughout the agency, in collaboration with Component records officials;
5. Ensures records training is developed and implemented for records positions;
6. Develops records retention schedules applicable throughout the Department;
7. Develops enterprise schedules;
8. Ensures all records are properly managed with RIM policies and procedures to include necessary tools to manage records;
9. Participates in Acquisition Decision Reviews and Events for all enterprise information technology acquisitions;
10. Facilitates and participates in activities of the Records Leadership Council (RLC);
11. Establishes RIM procedures for records and record systems/applications to be applied throughout DHS including:
 - a. Transfer of records to records custodians during out-processing.
 - b. Processing of records and IT system retention schedules.
12. Ensures that DHS enterprise-wide systems and applications are in compliance with applicable RIM policies.

B. **Chief Privacy Officer:**

1. Provides requirement to ensure records are stored in a way to make FOIA searches accurate and timely. Ensures privacy considerations are included in the RIM process during the creation or updating of any information systems containing records.
2. Ensures DHS employees understand how to properly handle record and non-record material with Personally Identifiable Information.
3. Ensures all DHS employees receive annual training on record management requirements for FOIA compliance.
4. Ensures privacy compliance documentation, including Privacy Threshold Assessments, Privacy Impact Analyses and Systems of Record Notices, cite an accurate and appropriate NARA approved retention and disposal schedule approved by Component Records Management Officers and the DHS Chief Records Officer (see DHS Instruction 047-01-001).

C. **Component Heads:**

1. Designate a Chief Records Officer for the Component, and ensure records custodians are identified for all records. Assign the Component Chief Records Officer with the responsibility for leading, overseeing, and implementing a RIM Program within the Component in accordance with DHS policy.
2. Ensure all acquisitions and all phases of the acquisition lifecycle incorporate records management requirements, to include coordination with the RIM Program.
3. Ensure that Component systems and programs are operating in compliance with the applicable privacy documentation and that privacy compliance documentation cites an accurate and appropriate NARA approved retention and disposal schedule.
4. Reinforce the importance of RIM at the leadership staff level through ongoing development training and ensure annual mandatory RIM training is accomplished for all Component employees in accordance with DHS policy.
5. Ensure the identification, retention, and management of electronic and paper records according to DHS Records policy, to include custodial transfer and custody of records during out-processing.

6. Ensure RIM is included in information technology system that are acquired or developed within their Component.

D. **RLC:**

1. Issues an annual RIM Report to the Under Secretary for Management (USM) and NARA;
2. Supports the Department's Chief Records Officer through the development of policies, procedures, related instructions, and quadrennial strategy;
3. Provides observations and recommendations regarding needed or proposed policy/program changes to the Chief Records Officer; and
4. Provides Component oversight and support for RIM activities.

E. **Component Chief Records Officers:**

1. Lead, oversee, and implement a RIM Program in accordance with DHS policy to include records management within systems development, governance, and acquisition review;
2. Ensure Component personnel maintain a uniform file plan system;
3. Ensure the identification, retention, and management of electronic and paper records according to DHS Records policy, to include custodial transfer and custody of records during out-processing;
4. Ensure records retention schedules are developed and applied throughout the Component;
5. Ensure Component RIM procedures include guidance for identifying and managing vital records in accordance with DHS RIM policy and the FCD 1 and 2;
6. Ensure Component records are aligned to the DHS RIM policy and requirements;
7. Coordinate with the Departmental Chief Records Officer to obtain NARA approval for all systems and record schedules;
8. Ensure the respective Component's portion of the file plan database is current;

9. Ensure all Component records are properly scheduled;
10. Ensure all Component personnel, including Program Managers, appropriately manage the records they create or receive in the course of conducting DHS business;
11. Coordinate compliance with FOIA, the Privacy Act and E-Discovery;
12. Ensure all employees in the Component receive necessary records training;
13. Require mandatory annual RIM training for all employees; and
14. Notify the DHS RIM Program Office and NARA when they become aware of any actual, imminent, or threatened unlawful removal, defacing, alteration, or destruction of records (including electronic or machine-readable records) in the custody of the agency.

F. **Subcomponent Records Liaisons:**

1. Serve as primary records points of contact for their Subcomponent and as an extension of the Component Records Manager;
2. Coordinate records activities for their Subcomponent on behalf of the Component Records Management Program;
3. Perform records management duties consistent with applicable ofpolicy and guidance; and
4. Collaborate with Component RIM Program Officials.

G. **Records Custodians:**

1. Inform the Subcomponent Records Management Liaison of any issues regarding the records in their custody, such as the deletion or loss of a record;
2. Ensure retention of records, non-records and personal papers subject to a hold or freeze upon notification from the Office of the General Counsel; and
3. Perform records management duties consistent with applicable policy and guidance.

H. **DHS RIM Program Office:**

1. Periodically evaluate or request the collection of information from the Component Chief Records Officers/Officials or Component Heads (as applicable) concerning the records management programs to be provided to the USM and NARA. The Office of Inspector General is exempt from such evaluation and/or information collection efforts;
2. Perform staff assistance visits as requested by Component leadership or records personnel; and
3. Promulgate RIM guidance for DHS through various media.

I. **DHS Program Managers:**

1. Implement RIM requirements and governance into all DHS acquisitions and all phases of the acquisition lifecycle, to include coordination, review, and approval from the RLC;
2. Incorporate mandatory RIM training for contractors on all DHS contracts when contractors handle, review, or process DHS records; and
3. Ensure that all DHS systems that create, handle, and store records are scheduled, that proper records controls are applied or that records are transferred to a Records Management Application as applicable.

J. **DHS Employees:**

1. Properly identify, capture, retain, file, and dispose of or transfer records regardless of media or phase of creation stage (records lifecycle) in accordance with Title 44 U.S.C. Chapter 31; NARA regulations, 36 CFR Chapter XII, Subpart B; and DHS records policy;
2. Properly identify, manage, and maintain vital records;
3. Complete RIM training annually;
4. Manage records created or received in the course of conducting DHS business, including E-Mail and instant messaging records according to applicable federal and DHS regulations and policy for RIM, Privacy, FOIA, Information Sharing, and E-Discovery;
5. Coordinate RIM activities with Component RIM personnel to ensure compliance with applicable policies and procedures;

6. When teleworking, identify, safeguard, and manage all records in accordance with DHS RIM policies. See additional telework guidance at DHS Directive 123-05;
7. Ensure physical records, e.g., printed email, show all the metadata and identifiers that would be available if the records were stored electronically including the names of the sender and recipients, date, subject, and a list of attachments, by configuring their office applications according to RIM Program Office guidance; and
8. Ensure any Federal Records under their direct control are transferred to their supervisors or records custodian as part of out-processing from DHS.

VI. Content and Procedures

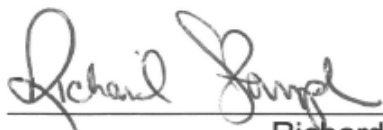
A. Records include all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or are appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in the records (44 U.S.C. 3301).

B. Records, regardless of media or phase of creation stage (records lifecycle) are properly identified, captured, retained, filed, and disposed of or transferred in accordance with Title 44 U.S.C. Chapter 31; NARA regulations, 36 CFR, Chapter XII, Subpart B; and DHS records policy.

1. Records are organized and identified across the Department through a standard filing system, the DHS-wide FEA BRM file plan.
2. Non-records are managed separately from records, inventoried, and deleted or destroyed in accordance with DHS Records Policy.
3. Personal records are non-records and maintained separately from DHS records and kept to a minimum.
4. Employees (including Career Senior Executive Service and Political Appointees) may not remove or duplicate DHS records upon separation without prior approval by the Component Head.
5. DHS records, regardless of format, cannot be destroyed without an approved schedule.

VII. Questions

Address questions regarding this Instruction contact a Component Records Liaison, Records Custodian, Records Officer (Component or DHS), or OCIO for assistance with records identification, permanent records management, records schedules, identification of non-record documents, and additional information about the Department's Record and Information Management Program.



Richard Staropoli
Chief Information Officer

6/7/17

Date

Exhibit 2



October 12, 2018

BY EMAIL: foia@hq.dhs.gov

Jonathan Cantor
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murry Lane SW
STOP-0655
Washington, D.C. 20528-0655

Re: Freedom of Information Act Request

Dear Mr. Cantor:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and U.S. Department of Homeland Security (“DHS”) regulations.

Specifically, CREW requests all documents reflecting currently operative policies, procedures, protocols, or directives concerning DHS’s records management program. This request includes without limitation (a) the “Policy & Procedures” publication referenced in Section 6 of DHS Records Management Directive 0550.1; and (b) all records management policies, procedures, protocols, or directives applicable to U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the

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document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. *See Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and DHS regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

In April 2018, the Trump Administration announced a new “Zero Tolerance” immigration enforcement policy, requiring that all improper entry offenses be referred for criminal prosecution to the extent possible. As the DHS Office of Inspector General (“OIG”) has noted, this policy “fundamentally changed DHS’ approach to immigration enforcement.”¹ Specifically, “[b]ecause minor children cannot be held in criminal custody with an adult, alien adults who entered the United States illegally would have to be separated from any accompanying minor children when the adults were referred for criminal prosecution.”² The children were then held in “DHS custody until they could be transferred to the [HHS] Office of Refugee Resettlement.”³

The fallout from the Zero Tolerance Policy was catastrophic, resulting in thousands of children being ripped from their parents. Following massive public outcry, President Trump halted the family separations by Executive Order issued June 20, 2018. On June 26, 2018, a federal court ordered the Government to reunify separated children and parents within 30 days—an order it has still not fulfilled.

On September 27, 2018, the DHS OIG issued a report titled Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy. The OIG found that “DHS was not fully prepared to implement the Administration’s Zero Tolerance Policy or to deal with some of its after-effects,” and that “DHS . . . struggled to identify, track, and reunify families separated under Zero Tolerance due to limitations with its information technology system.”⁴ The OIG further noted that contrary to DHS’s public statements in June 2018 that it had a “central database” with location information for separated parents and

¹ DHS OIG, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, at 2 (Sept. 27, 2018), *available at* <https://bit.ly/2NhATFE>.

² *Id.* at 3.

³ *Id.*

⁴ *Id.* at 1.

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minors, “OIG found no evidence that such a database exists.”⁵ The OIG also observed problems with DHS’s record management practices, noting that the agency took “many weeks” to provide OIG with data relating to alien family separations and unification, that the data DHS eventually supplied did not appear to be maintained “in a readily accessible format,” and that the data was “incomplete and inconsistent, raising questions about its reliability.”⁶

Concerns have also been raised about DHS’s possible destruction of records that could have been used to reunite hundreds of families.⁷ Such conduct would plainly violate the Federal Records Act, if not other laws.

The requested records will shed light on serious deficiencies in DHS’s record management policies and practices—deficiencies which have had catastrophic consequences in connection with the agency’s implementation of the Zero Tolerance policy. As indicated by the widespread media coverage it has received, these are issues of intense public interest.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public’s right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW’s financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely and systematically disseminates information to the public in several ways. CREW’s website receives tens of thousands of page views every month. The website

⁵ *Id.* at 10.

⁶ *Id.* at 11.

⁷ *See* Letter from CREW to U.S. Archivist, July 6, 2017, available at <https://bit.ly/2IWqi2o>; Caitlin Dickerson, Trump Administration in Chaotic Scramble to Reunify Migrant Families, *New York Times*, July 6, 2018, available at <https://nyti.ms/2MU6hKG>; Michelle Mark, Customs agents reportedly deleted records that could have been used to reunite hundreds of immigrant families, *Insider*, July 6, 2018, available at <https://bit.ly/2A7QzYO>; Letter from Sen. Blumenthal et al. to DHS, July 30, 2018, available at <https://bit.ly/2LEb0DP>.

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includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts the documents it receives under the FOIA on its website, and that site has been visited hundreds of thousands of times.

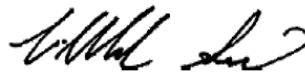
Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or nsus@citizensforethics.org. Also, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me at either nsus@citizensforethics.org or Nikhel Sus, Citizens for Responsibility and Ethics in Washington, 455 Massachusetts Ave., N.W., Washington, D.C. 20001. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikhel Sus".

Nikhel Sus
Staff Counsel

Exhibit 3

DHS records management policy publication?

Hudson, Tammy <tammy.hudson@hq.dhs.gov>
To: Nikhel Sus <nsus@citizensforethics.org>

Mon, Oct 15, 2018 at 10:54 AM

Good morning Nik,

If the policy is not available on the DHS.gov site, then you will need to file a FOIA request.
<https://www.dhs.gov/steps-file-foia>

Thank you,

Tammy Hudson

Records Officer, Department of Homeland Security

From: Nikhel Sus <nsus@citizensforethics.org>
Sent: Monday, October 15, 2018 9:58 AM
To: Hudson, Tammy <tammy.hudson@HQ.DHS.GOV>
Subject: DHS records management policy publication?

Good morning Ms. Hudson,

My name is Nikhel Sus and I am a counsel at CREW. I'm attempting to locate DHS's records management policy. It does not appear to be available on DHS's website.

Section 6 of DHS Records Management Directive 0550.1 says

"The **attached publication** establishes specific DHS policy and procedures for managing records effectively and efficiently throughout their life cycle. These procedures will help DHS successfully accomplish its mission, preserve official records in accordance with applicable statutory and regulatory requirements, and promote access to information by DHS staff and the public as appropriate." https://www.dhs.gov/sites/default/files/publications/mgmt_directive_0550_1_records_management_0.pdf

The "attached publication" is not in fact attached, nor can I find it online.

Are you able to provide the publication, or point me in the right direction? I would greatly appreciate it.

Thanks very much,

Nik

--

Nikhel Sus

Staff Counsel, Complaints & Litigation

Citizens for Responsibility and Ethics in Washington (CREW)

202-408-5565

nsus@citizensforethics.org | www.citizensforethics.org

CREW | Citizens for Responsibility and Ethics in Washington
Main: (202) 408-5565 | Fax: (202) 588-5020 | www.citizensforethics.org
