



December 6, 2019

SENT VIA E-MAIL OGC_EFOIA@BOP.GOV

FOIA/PA Section
Office of General Counsel, Room 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

**Re: FOIA Request Related to BOP Restraint and Confinement
of Pregnant People**

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION

PLEASE RESPOND TO:
NATIONAL PRISON PROJECT
915 15TH STREET, NW
7TH FLOOR
WASHINGTON, DC 20005-2112
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DAVID C. FATHI
DIRECTOR
ATTORNEY AT LAW*

*NOT ADMITTED IN DC;
PRACTICE LIMITED TO
FEDERAL COURTS

Dear Freedom of Information Officer:

The American Civil Liberties Union (“ACLU”) submits this Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, request for production of records (the “Request”). The ACLU also seeks a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A) and 28 C.F.R. § 16.10(k)(1). The justification for the fee waiver is set out in detail following the Request.

REQUEST FOR INFORMATION

Requesters seek any and all records that were prepared, received, transmitted, collected and/or maintained by the U.S. Bureau of Prisons (BOP) that describe, refer or relate to policies, guidelines, protocols, or procedures regarding treatment of pregnant individuals in BOP custody. We request the records specified below from December 1, 2017 to the present (unless otherwise noted).

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this FOIA request should also be considered within the request’s scope. Where available, we request that records responsive to this request be produced in the original electronic format with all metadata and load files. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. Please do not compress images or downsample the resolution, as this interferes with their legibility. To facilitate a speedy response, we ask that records responsive to this request be produced on a rolling basis. Requesters will accept records and other information that have been redacted pursuant to the Health Insurance and

Portability Accountability Act¹ or other statutes or regulations protecting the privacy of individual detainees.

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

For purposes of this request, “BOP Institution” has the same scope used in 28 C.F.R. §500.1(d).

For purposes of this request, the terms “prisoner” and “inmate” have the same scope as “INMATE” used in 28 C.F.R. §500.1(c).

Specific Records Requested

1. Any and all records relating to or implementing 18 U.S.C. § 4322, “Use of Restraints on Prisoners During the Period of Pregnancy, Labor, and Postpartum Recovery Prohibited,” including any and all reports provided to the Director of the Bureau of Prisons and/or to the healthcare professional(s) responsible for the health and safety of the prisoner documenting the use of restraints on any pregnant or postpartum prisoner, the reasoning upon which the decision to use restraints was made, the type and length of time of the restraint, and any resulting physical effects; and any and all PowerPoint presentations and handouts, displayed or distributed to staff and administrators at BOP institutions as well as any contractors in connection with training implementing or related to the law, as well as material in connection with training related to steps to be taken if and when a prison requests abortion information and/or services.
2. Any and all BOP policies, practices, and procedures for handling prisoners’ request for information about or access to abortion.
3. Any and all records documenting the process for determining whether and in what situations a prisoner who is pregnant, is postpartum, who recently had a miscarriage or who recently had a terminated pregnancy

¹ 42 U.S.C. § 1320d-6.

may be placed in restrictive housing, under the Department of Justice Restrictive Housing Report and Recommendations and the Female Offender Manual at 19.

4. Any and all records documenting instances in which senior officials approved the initial or continued placement of a prisoner who is pregnant, is postpartum, who recently had a miscarriage or who recently had a terminated pregnancy in restrictive housing, under the Department of Justice Restrictive Housing Report and Recommendations and the Female Offender Manual at 19.
5. Any and all records indicating the number of times a prisoner who was pregnant, was postpartum, who recently had a miscarriage or who recently had a terminated pregnancy who was in BOP custody was placed into restrictive housing, regardless of whether that placement was approved by senior officials; the justification for such placement; and the length of time of such placement.
6. Any records, including significant incident reports (SIRs) and associated documentation, regarding the identification, care, and treatment of prisoners who are pregnant, postpartum, who recently had a miscarriage or who recently had a terminated pregnancy in BOP custody.

FEE WAIVER

The ACLU requests that any fees associated responding to its FOIA request be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(1). Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(1), fees should be waived or reduced if disclosure is (1) in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interest of the requester.” Disclosure in this case meets both of these tests. The ACLU also requests a waiver or reduction of fees on the grounds that the ACLU qualifies as a “representative[] of the news media” and the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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

First, disclosure pursuant to this Request is in the public interest. The operation of the U.S. criminal justice system and the treatment of detained women is of great concern to the public. Although women represent a minority of incarcerated people in the United States, their numbers are growing at an

alarming rate. Between 1980 and 2016, the number of incarcerated women increased by over 700%.² In this time, the number of incarcerated women has grown at twice the rate of men.³

In a one-year period during 2016 and 2017, 172 pregnant people were admitted to BOP facilities.⁴ Access to prenatal care is especially important for this population because most prisoners have high-risk pregnancies and need special care to keep them and their children safe during and after pregnancy.⁵ Both the media and the public in general have shown great concern about the shackling of pregnant people and other deficiencies of pregnancy care.⁶

The First Step Act recently codified a long-standing administrative prohibition on using shackles on pregnant or post-partum people.⁷ This is an important move, but public records disclosures from other states that have passed similar legislation demonstrate that official prohibitions are often circumvented;⁸ it is important to the public to be made aware as to whether pregnant/postpartum people are being shackled notwithstanding the new legislation. Placing pregnant people in shackles or restraints can have serious health consequences, as outlined by the American College of Obstetricians and Gynecologists.⁹

² *Incarcerated Women and Girls*,

<https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

³ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth* (2018), https://www.prisonpolicy.org/reports/women_overtime.html.

⁴ Carolyn Sufrin *et al.*, *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 AM. J. PUB. HEALTH 799,802 Tbl. 2 (2019), available at <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305006>.

⁵ Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. OF PERINATAL EDUC. 37, 37-42 (2008), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2409166/pdf/JPE170037.pdf>.

⁶ *The Drama of Pregnant Women In Prison – And The Woman On A Mission To Fix It*, <https://www.forbes.com/sites/ashoka/2018/10/25/the-drama-of-pregnant-women-in-prison-and-the-woman-on-a-mission-to-fix-it/#2f260c03948c>;
<https://rewire.news/article/2018/01/24/hungry-shackled-grieving-prison-like-pregnant-people/>

⁷ 18 USC § 4322(a).

⁸ THE PRISON BIRTH PROJECT & PRISONERS' LEGAL SERVICES OF MASSACHUSETTS, *BREAKING PROMISES: VIOLATIONS OF THE MASSACHUSETTS PREGNANCY STANDARDS & ANTI-SHACKLING LAW* (2016), http://www.plsma.org/wp-content/uploads/2016/05/Breaking-Promises_May2016.pdf (Massachusetts); Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* (2015), <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf> (New York).

⁹ *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (reaffirmed 2016), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females>.

Given the significant attention to this issue by advocacy groups, medical experts, media groups, and legislators, the requested records will contribute significantly to the public's understanding of the treatment of women in BOP custody.

1. Disclosure is not primarily in the commercial interest of the ACLU.

Second, the ACLU is not filing this request to further a commercial interest. The ACLU is a 501(c)(3) nonprofit organization and therefore has no commercial interest. The ACLU intends to make any relevant information obtained through this FOIA available to the public.¹⁰ The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee.

The ACLU also disseminates information through its heavily subscribed website, <http://www.aclu.org>. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU website also includes many features on information obtained through FOIA requests. For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves.¹¹ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, in February 2017 the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program. The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request at no cost.

¹⁰ See 28 C.F.R. § 16.10(k)(1); 28 C.F.R. § 16.10(k)(2)(ii).

¹¹ The Torture Database, <https://www.thetorturedatabase.org> (last visited Sept. 19 2019); see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

2. *The ACLU also qualifies for a fee waiver because it is representative of the news media and the records are not sought for commercial use.*

The ACLU is also entitled to a fee waiver on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III);¹² *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (holding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”).¹³

Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. For example, the ACLU regularly publishes *ACLU Magazine* that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 950,000 households. The ACLU also publishes regular updates and alerts via email to approximately 4 million subscribers (both ACLU members and nonmembers). These updates are additionally broadcast to 4.9 million social media followers (members and non-members). The magazine, email, and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests.¹⁴ These reports, analysis, multi-media features, including videos and

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

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

¹⁴ *See e.g. Fatal Neglect: How ICE Ignores Deaths in Detention* (2017).

podcasts, as well as case related news and archives addressing civil rights and liberties issues are disseminated widely through various ACLU channels including the website. The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,¹⁵ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹⁶ ACLU national projects also regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.¹⁷ This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee.

¹⁵ See, e.g., Press Release, ACLU, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, ACLU, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>.

¹⁶ See, e.g., Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler).

¹⁷ See, e.g., Manar Waheed, *Customs and Border Protection Violated Court Orders During the First Muslim Ban Implementation* (Jan. 24, 2018, 3:45 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/customs-and-border-protection-violated-court>; Vera Eidelman, *We Sued for Records About Trump’s Muslim Bans. Here’s What We Found Out*. (Oct. 24, 2017, 3:15 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/we-sued-records-about-trumps-muslim-bans-heres>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Galen Sherwin, ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (May 27, 2016), <https://www.aclu.org/report/leaving-girls-behind>.

The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties. In addition, the ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. In the past year alone, the ACLU’s online articles were viewed 11.3 million times. ACLU content gets more reader engagement – shares, clicks, and likes – than sites operated by many traditional media companies. The ACLU’s social media content has 2.2 million total page “likes,” which is more than The Atlantic, ThinkProgress, and Vox. The ACLU also creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. Therefore, when it conducts these public education and dissemination activities, the ACLU is a representative of the news media.

Underscoring this point, courts have found that other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s are “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).¹⁸

As a representative of the news media, the ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use. On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”¹⁹ A fee waiver would

¹⁸ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

¹⁹ For example, in May 2016, the FBI granted a fee-waiver request regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-

fulfill Congress's legislative intent in amending FOIA.²⁰ Additionally, on account of these factors, the ACLU has not been charged fees associated with responding to FOIA requests on numerous occasions.²¹

In sum, because disclosure of the requested documents is in the public interest and not primarily in the commercial interest of the requester, and because the ACLU is a representative of the news media, the ACLU is entitled to a total waiver of fees associated with this Request and should, in no event, be required to pay more than reasonable standard charges for document duplication. In the event that you decide not to waive the fees, please provide me with prior notice so that we can discuss arrangements.

* * *

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

waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to "national security letters" issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ.

²⁰ See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requestors.'") (citation omitted); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) ("[FOIA's] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.") (internal quotation marks and citation omitted).

²¹ For example, in August 2016, the ICE FOIA Office and DHS Privacy Office both granted fee waivers to the ACLU for a FOIA request seeking a DHS OIG super-memorandum and ICE's response to that memorandum. Similarly, in March 2016, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about selected deaths in detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office. In July 2015, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about the use of segregation in ICE detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office.

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Please call me at (202) 548-6618 if you have any questions or wish to obtain further information about the nature of the records in which we are interested.

**AMERICAN CIVIL
LIBERTIES
UNION FOUNDATION**

Respectfully,

A handwritten signature in black ink that reads "Lauren Kuhlik". The signature is written in a cursive, flowing style.

Lauren Kuhlik
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