



VIA FedEx and Email

October 16, 2018

U.S. Department of Homeland Security
Attn: Chief Information Officer
245 Murray Lane, SW
Washington, DC 20528
DHS.InfoQuality@hq.dhs.gov

Re: *New Information Regarding June 28, 2018 Request For Correction Under the Information Quality Act; Demand For Response*

To Whom It May Concern:

On behalf of Americans for Immigrant Justice (“AI Justice”), Muslim Advocates, and the Refugee and Immigrant Center for Education and Legal Services (“RAICES”) (collectively, the “Requesters”), Democracy Forward Foundation (“Democracy Forward”) writes regarding a request for correction of certain information, made pursuant to the Information Quality Act (“IQA”), submitted to the U.S. Department of Homeland Security (the “Department” or “DHS”) on June 28, 2018 (the “Request”). The Department has failed to provide any response to the Request within the sixty (60) day time period set forth in the Information Quality Act (the “IQA”) and the Department’s implementing guidelines. This is a clear violation of the IQA.

We write now to demand that the Department provide a response to the Request at the earliest possible date. The Department should do so with urgency, particularly in light of publicly available information that has come to light recently and that further substantiates the allegations made in the original Request. This new information makes clear that the Department misled the public when it denied the existence of a family separation policy and issued its Myth vs. Fact Sheet.¹

¹ All of the arguments raised in the Request remain valid, and are incorporated by reference herein.

The Request for Correction Under the IQA

On June 28, 2018, the Requesters submitted the Request to the Department, asking that it retract and correct misleading and unreliable information disseminated by the Department regarding the Trump Administration’s decision to separate children from their parents pursuant to the so called ‘zero tolerance policy’ the Department had adopted. The Department falsely claimed in several prominent instances—including through an officially disseminated Myth vs. Fact Sheet, which is principally at issue in the Request—that the existence of a DHS family separation policy was merely a “myth.” *See* Request at 3. The false and misleading Myth vs. Fact Sheet remains in its disseminated form on the Department’s public website.²

As explained more fully in the Request, the misleading nature of this assertion was made plain by DHS’ own press statements, DHS forms, comments from the former DHS Secretary, comments from the Attorney General, and even the Myth vs. Fact Sheet itself. *See* Request at 2, 6-7. Moreover, even if the Department could set aside or explain away this mounting evidence (it cannot), the nearly 2,000 instances where children were separated from their parents upon entering the United States still stand as proof positive that a policy existed to effectuate that separation. *Id.* at 6. And the hundreds of children who remain separated from their parents serve as a heart-rending reminder of the existence and consequences of the policy and the gravity of the Department’s lie.³

DHS owes these families much more than a retraction and correction of the Myth vs. Fact Sheet, but the IQA obligates it to do at least that much.

The Newly Released DHS Zero Tolerance Memo

Although the Department’s adoption of a “zero tolerance” policy, through which it would refer for prosecution all adults who unlawfully entered the country, was reported in the press at the time,⁴ DHS did not make public the actual decision memorandum authorizing this policy (the “DHS Zero Tolerance Memo”).⁵ That memorandum was recently released pursuant to a request

² U.S. Dep’t of Homeland Sec., Myth vs. Fact: DHS Zero-Tolerance Policy (“Myth vs. Fact Sheet”) (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>.

³ See Hannah Wiley, *Hundreds of Migrant Kids Haven’t Been Reunited With Their Parents. What’s Taking So Long?*, Tex. Trib., Oct. 4, 2018, <https://www.texastribune.org/2018/10/04/zero-tolerance-policy-reunite-separated-immigrant-families/>.

⁴ See Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution Of Parents Crossing Border With Children*, Wash. Post, April 26, 2018, https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdce0-4964-11e8-8b5a-3b1697adcc2a_story.html?utm_term=.6d4e2da16edc (describing a memorandum from top DHS officials recommending a policy of “zero-tolerance” that “could split up thousands of families”).

⁵ Open the Government, *Newly Released Memo Reveals Secretary of Homeland Security Signed Off on Family Separation Policy*, Sept. 24, 2018, <https://www.openthegovernment.org/node/5713> (linking to the DHS Zero Tolerance Memo).

made under the Freedom of Information Act (the “FOIA”).⁶ The Department’s efforts to deny the existence of its family separation policy—including its dissemination of the Myth vs. Fact Sheet—are revealed to be all the more misleading now that the Department’s memo authorizing the policy has been made publicly available.

Critically, the memorandum lays bare that DHS initiated the “zero tolerance” policy with the belief that it had the legal authority to “*direct the separation of parents or legal guardians and minors* held in immigration detention so that the parent or legal guardian can be prosecuted pursuant to these authorities.” DHS Zero Tolerance Memo at 3 (emphasis added). The DHS Zero Tolerance Memo then sets forth “several options for how to pursue this increased prosecution,” *id.*, and recommends an option that “would pursue prosecution of *all amendable adults* who cross our border illegally, *including those presenting with a family unit*, between ports of entry in coordination with DOJ.” *Id.* at 5 (emphasis added). The recommended option was favored because it was viewed as “the most effective method to achieve *operational objectives* and the Administration’s goal to *end ‘catch and release.’*” *Id.* (emphasis added). This recommendation—made with the explicit understanding that it would produce the separation of children from their parents—was then accepted and approved by Secretary Kirstjen Nielsen. *Id.*⁷

Past statements from senior members of the Administration make clear that the central “operational objective” for Southwest Border enforcement was the creation of a mechanism for deterring families from attempting to enter the United States for purposes of establishing an asylum claim. And, as the Request thoroughly illustrated, separating children from their parents has consistently been viewed as a viable, and even preferred, deterrence mechanism by this Administration. Request at 6. Indeed, in March 2017, then-Secretary of DHS John Kelly confirmed that the Department was already considering separating children from their parents “in order to deter more movement” by immigrants across the Southwest Border. *Id.*⁸ Further, in announcing the U.S. Department of Justice’s (“DOJ”) counterpart zero tolerance policy—pursuant to which DOJ promised to prosecute every individual referred by DHS for the misdemeanor offense of unlawfully entering the country—Attorney General Jeff Sessions stated: “*If you don’t want your child separated, then don’t bring them across the border illegally.* It’s not our fault that somebody does that.” *Id.* at 6-7.⁹

⁶ *Id.*

⁷ Secretary Nielsen’s signature is redacted in the version of the DHS Zero Tolerance Memo released through the FOIA, but a spokesperson for the Department has reportedly confirmed that it is Secretary Nielsen’s. See Cora Currier, *Prosecuting Parents—And Separating Families—Was Meant To Deter Migration, Signed Memo Confirms*, Intercept, Sept. 25, 2018, <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/>.

⁸ See Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN, Mar. 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>. Although Mr. Kelly later attempted to walk back his comments about implementing a family separation policy, this cruel policy reportedly continued to surface within the Administration as they considered options that might be deployed to deter unlawful migration across the Southwest Border. See Jonathan Blitzer, *How The Trump Administration Got Comfortable Separating Immigrant Kids From Their Parents*, New Yorker, May 30, 2018, <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>.

⁹ See also Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children from Their Parents*, Wash. Post, May 7, 2018, <https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border/>

Implementing a family separation policy is also critical to the Administration’s stated desire to end so-called “catch and release.”¹⁰ Because children cannot be detained in adult criminal facilities, DHS could not refer all cases of unlawful entry for prosecution, as the Administration desired to do, unless it separated children from their parents in cases where a parent was apprehended upon entry with children. Past Administrations decided, for both moral and resource preservation reasons, that families would not be separated in order to prosecute an adult for misdemeanor unlawful entry. “Accordingly, in most instances, family units either remained together in family detention centers operated by ICE while their civil immigration cases were pending, or they were released into the United States with an order to appear in immigration court at a later date.”¹¹ Neither option was acceptable to the Trump Administration—the Department has derided the latter practice as a policy of “catch and release”—so the Department switched course and “fundamentally changed [its] approach to immigration enforcement.”¹²

Ultimately, the DHS Zero Tolerance Memo makes uncontroversibly clear that forcibly separating children from parents,¹³ so that the parents could be prosecuted for the misdemeanor of unlawful entry, was affirmatively promoted by the Department as purportedly the most effective means of achieving the twin policy goals of maximally deterring individuals from presenting asylum claims at the Southwest Border, and circumventing the legal protections that limited options for family detention, which the Administration believes led to “catch and release” enforcement.

On recommendation from top immigration officials that referral for prosecution of all adults who entered unlawfully was the approach most likely to deter further unlawful entry across the Southwest Border, and that the separation of children from the parents they crossed with was both necessary to criminally prosecute and then indefinitely detain those adults and beneficial to the overall policy goals of the Administration, Secretary Nielsen signed into effect

unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html?utm_term=.ebd7534f42e5 (emphasis added).

¹⁰ See DHS Zero Tolerance Memo at 9; see also President Donald J. Trump, Presidential Memorandum: *Ending “Catch and Release” At the Border of the United States and Directing Other Enhancements to Immigration Enforcement* (Apr. 6, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/>.

¹¹ U.S. Dep’t Homeland Sec. Off. of Inspector Gen., *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, at 2 (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> (the “OIG Report”). Note, however, that “the time children can stay at such family centers [is limited] to 20 days.” *Id.* (citing *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015). By separating children from their parents, DHS can both prosecute *all* who enter unlawfully—even those entering with children in tow—and keep all immigrants in custody for far longer. Adults remain in ICE facilities, and children are re-designated as “unaccompanied minors” and transferred to the U.S. Department of Health and Human Services, which has responsibility for long-term detention of unaccompanied minors.

¹² *Id.* at 2, 3.

¹³ See Ed Lavandera et al., *She Says Federal Officials Took Her Daughter While She Breastfed the Child in a Detention Center*, CNN, June 14, 2018, <https://www.cnn.com/2018/06/12/us/immigration-separated-children-southern-border/index.html>.

the DHS Zero Tolerance Memo. Accordingly, upon affixing her signature to that memorandum, the separation of children from their parents became official Department policy and, for the reasons set forth above and in the Request, it strains credulity for the Department to assert otherwise.

* * * * *

In misrepresenting to the public that the Department was not engaging (or had not engaged) in a policy of separating families, DHS ran afoul of the IQA. By failing to respond to the Request and by continuing to disseminate misleading information through the Myth vs. Fact Sheet, the Department continues to violate the IQA. Respectfully, we demand that the Department provide a response at the earliest possible opportunity, and no later than October 31, 2018.

Sincerely,

/s/ Karianne Jones

Karianne Jones, Counsel
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090

Counsel for the Requesters

Cc:
The Honorable Kirstjen Nielsen
Secretary of Homeland Security
U.S. Department of Homeland Security
Nebraska Avenue Complex
3801 Nebraska Ave, NW
Washington, DC 20016