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Via Certified Mail and Electronic Delivery

John M. Mitnick, General Counsel
Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485
ogc@hq.dhs.gov

Scott K. Falk, Chief Counsel
Office of Chief Counsel
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington, DC 20229

Dear Mr. Mitnick,

In the wake of recent deaths of two young children in U.S. Customs and Border Protection (“CBP”) custody, and in light of the still unmet need for a full public accounting of the facts and circumstances surrounding these untimely deaths, we write to remind CBP of its duty to preserve agency records related to these tragedies pursuant to the Federal Records Act (“FRA”), 44 U.S.C. Chapter 31. As the chief legal officer for the U.S. Department of Homeland Security (“DHS” or “Department”), we ask that you take all necessary steps to ensure that proper record retention practices are followed by DHS and CBP—an agency under the supervision of DHS—and by any DHS or CBP officials who might be custodians for records relevant to these tragedies.

Factual Background

On December 8, 2018, Jakelin Amei Rosmery Caal Maquin, a 7-year old girl from Guatemala, died while in the custody of CBP agents.¹ On December 24, 2018, Felipe Gómez Alonzo, an 8-

¹ Nick Miroff and Robert Moore, *7-Year Old Migrant Girl Taken Into Border Patrol Custody Dies of Dehydration, Exhaustion*, Wash. Post (Dec. 13, 2018), https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199_story.html?utm_term=.bd3b5050fbbb; John Stanton, *Border Patrol Told A Congressional Delegation It Can't Meet With Agents Who Detained A 7-Year-Old*, BuzzFeed News (Dec. 17, 2018), <https://www.buzzfeednews.com/article/johnstanton/border-patrol-congress-guatemalan-girl>.

year old boy who was also from Guatemala, died while in the custody of CBP agents.² Reports that a second child had died in CBP custody only weeks after the first tragedy were met with widespread condemnation and calls for a thorough investigation into the circumstances of the deaths.³

Unsurprisingly, news of these deaths prompted calls for investigations from the families of the deceased children, the government of Guatemala, and leaders in Congress, and investigations appear to have been initiated by, or complaints have been opened with, CBP's Office of Professional Responsibility, DHS's Inspector General, and DHS's Office of Civil Rights and Civil Liberties.⁴

Indeed, we are aware that members of Congress have already signaled their intent to conduct oversight hearings and investigations into this matter, and that they have also put the Department on notice of the record preservation obligation it owes to Congress.⁵ We are aware too that DHS and CBP have been less than candid and cooperative in their responses to Congress. Of note, CBP Commissioner Kevin McAleenan failed to publicly disclose the December 8, 2018 death of Jakelin Amei Rosmery Caal Maquin when he testified before the Senate Judiciary Committee on December 11.⁶ And members of the Congressional Hispanic Caucus were reportedly told they would not be permitted to speak with the CBP agents who maintained custody over Jakelin Amei Rosmery Caal Maquin during their planned visit to the CBP facility where she was detained.⁷

Moreover, many of the facts necessary to understand why and how these children died—and what degree of culpability CBP bears for their deaths—are not yet publicly known. Such important details must include, at least: information about the children's health at the point of their arrests; the conditions of their confinement; the quality and kind of medical screenings and treatment they received from CBP officials at each point while they were in CBP custody; whether language access issues created barriers to effective communication between the children, their guardians, and CBP officials; and any other records that would shed important light on the nature of CBP's conduct throughout the duration of their respective periods of confinement, including any and all video footage pertaining to the locations where both children were held during their periods of transport and confinement. Further, it is essential to understand what CBP knew before the arrival of these children about the conditions of confinement in the

² Miriam Jordan, *'A Breaking Point': Second Child's Death Prompts New Procedures for Border Agency*, N.Y. Times (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/us/felipe-alonzo-gomez-customs-border-patrol.html>.

³ Miroff and Moore, *supra* note 1.

⁴ See, e.g., Jordan, *supra* note 2; see also Press Release, U.S. Rep. Jerrold Nadler, *Top House Democrats Call for Preservation of Records Related to Child Deaths in CBP Custody and Announce Plans for Oversight Hearings in 116th Congress* (Dec. 27, 2018), <https://nadler.house.gov/press-release/top-house-democrats-call-preservation-records-related-child-deaths-cbp-custody-and>.

⁵ Press Release, U.S. Rep. Jerrold Nadler, *Top House Democrats Call for Preservation of Records Related to Child Deaths in CBP Custody and Announce Plans for Oversight Hearings in 116th Congress* (Dec. 27, 2018), <https://nadler.house.gov/press-release/top-house-democrats-call-preservation-records-related-child-deaths-cbp-custody-and>.

⁶ Anne Flaherty and Wil Cruz, *Border Patrol Head Didn't Tell Congress About Jakelin Caal Maquin To Avoid 'Politicizing' Girl's Death*, ABC News (Dec. 16, 2018), <https://abcnews.go.com/US/border-patrol-head-congress-jakelin-caal-maquin-avoid/story?id=59849324>.

⁷ See Stanton, *supra* note 1.

facilities where they would be detained and the availability of appropriate medical screenings and treatment.

Specifically with respect to Felipe Gómez Alonzo, who was first taken by Border Patrol agents to the Gerald Champion Regional Medical Center (GCRMC) in Alamogordo, New Mexico, before he was discharged to Border Patrol custody and eventually readmitted to the New Mexico hospital where he ultimately died, it is further important that DHS and CBP retain the following: records pertaining to instructions or guidance provided to CBP officials by GCRMC staff regarding post-discharge care; records provided to CBP describing the health status of Felipe Gómez Alonzo upon his discharge from GCRMC; and any records provided to GCRMC staff describing steps CBP would take post-discharge to provide continued care, or describing the conditions of confinement to which Felipe would be returned post-discharge.

The Department and CBP’s lack of openness and transparency—in combination with the significant public interest in understanding fully how two small children could, only weeks apart, tragically die while in CBP custody—gives rise to concerns that CBP may also fall short on fulfilling its various record preservation obligations. We write now, in light of these concerns, to remind the Department of the separate and legally distinct obligation it owes to the American public to preserve records under the FRA, a duty owed to the public regardless of how damning the records might be.

The Federal Records Act

The FRA commands that “[t]he head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, . . . 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.”⁸ For purposes of the FRA, the term “records” “includes all recorded information . . . made or received by a Federal agency . . . in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government[.]”⁹

The FRA “strictly limits the circumstances under which records can be removed from federal custody or destroyed.”¹⁰ Each agency head must “establish safeguards against the removal or loss of records the head of such agency determines to be necessary,” including “making it known to officials and employees of the agency . . . that records in the custody of the agency are not to be alienated or destroyed” except as permitted by the FRA.¹¹ Moreover, if the head of an agency is aware of “any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency,” he or

⁸ 44 U.S.C. § 3101.

⁹ *Id.* § 3301(a)(1)(A).

¹⁰ *Jud. Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C. Cir. 2016).

¹¹ 44 U.S.C. § 3105.

she much “notify the Archivist” and “with the assistance of the Archivist . . . initiate action through the Attorney General for the recovery of records.”¹²

Records subject to the FRA’s preservation obligations would include, in this case, at least the following:

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

¹² *Id.* § 3106(a).

water, welfare checks, overcrowding, temperature, and all other conditions of confinement or transport for undocumented persons apprehended at or near the Paso del Norte port of entry and/or detained at the El Paso Border Station and/or Alamogordo Station; and

13. All records created on or after January 20, 2017 related to services for persons whose first language is Q'eqchi', Chuj, or another Mayan language, including translation and medical care, and/or related to health problems involving persons whose first language is Q'eqchi', Chuj, or another Mayan language.

To ameliorate these concerns, your office should take immediate steps to ensure that CBP has preserved, and will maintain proper custody of, all records relating to the deaths of Jakelin Amei Rosmery Caal Maquin and Felipe Gómez Alonzo, as required by the FRA. Your office should further publicly release a statement affirming the Department's commitment to properly preserving records under the FRA, and detailing a plan of action for ensuring CBP meets those obligations here. Finally, we request that your office provide a written response to this letter within thirty (30) days.

Sincerely,

/s/ Jeffrey Dubner

Jeffrey Dubner, Senior Counsel
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043

/s/ Tom Jawetz

Tom Jawetz, Vice President of Immigration Policy
Center for American Progress
1333 H Street, NW
10th Floor
Washington, DC 20005

Cc:

Kirstjen Nielsen, Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Kevin K. McAleenan, Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington, DC 20229