



U.S. Department of Homeland Security
FOIA Appeals
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Washington, DC 20528-0655

U.S. Customs and Border Protection
FOIA Appeals, Policy and Litigation Branch
90 K Street NE, 10th Floor
Washington, DC 20229-1177

July 10, 2019

Re: Freedom of Information Act Appeal for FOIA Request 2018-HQFO-01153; CBP-2018-068460

Dear Appeals Officers:

I write pursuant to the Freedom of Information Act and DHS's implementing regulations to appeal the agency's partial denial of a request for records submitted by the Center for American Progress ("CAP") on June 26, 2018 and assigned DHS tracking number 2018-HQFO-01153 and CBP tracking number CBP-2018-06460. The agency's search is manifestly inadequate. On or about May 11 or 12, 2018, Mr. Muñoz was in the lawful custody of CBP when, according to public reports, a Border Patrol agent forcibly removed Mr. Muñoz's child from his arms and placed him in a separate holding cell from his wife and child; a record pertaining to this Use of Force likely should have been generated pursuant to agency policy. Mr. Muñoz was subsequently transferred from the McAllen Central Processing Facility to the Starr County Jail, which should have required the agency to create specific records ensuring they do not lose a person in custody. Within 12 hours of his transfer to the Starr County Jail Mr. Muñoz was dead by suicide. As a result of his death—and particularly after inquiries were by members of the news media and likely congressional offices—additional records would have been generated or maintained by CBP in reaction to his death. None of these records are included in CBP's four-page production and no documents were provided by DHS or any other component. The search was therefore manifestly inadequate.

Upon receiving records from an adequate search, I reserve the right to challenge all of the agency's withholdings, given the public interest in the matter.

I. BACKGROUND

In May 2018, the U.S. Department of Justice (DOJ) and the U.S. Department of Homeland Security (DHS) announced a new "zero tolerance" policy to prosecute all persons apprehended

between ports of entry along the U.S. southwest border.¹ As a result of this policy decision and others, more than 2,700 children were separated over a period of months from their parents upon apprehension.²

On May 11, shortly after the announcement of the family separation policy, a Honduran man named Marco Antonio Muñoz, 39, entered the United States with his wife and three-year-old son to request asylum.³ On May 11 or 12, while still in the custody of the Border Patrol, Mr. Muñoz was reportedly informed that he would be separated from his family and he became distraught. According to reports, a Border Patrol agent forcibly removed Mr. Muñoz's son from his arms and placed Mr. Muñoz in a "chain-link detention cell." Because he remained distraught, agents transferred Mr. Muñoz by van to the Starr County Jail where he was held overnight in a padded isolation cell.

Within twelve hours of entering the Starr County Jail, Mr. Muñoz was dead of an apparent suicide.⁴ According to a Custodial Death Report, detention officers checked on Mr. Muñoz every 30 minutes but during the check performed by officers on the morning shift he was found to be unresponsive. A review of the video footage of his cell after his death by jail personnel revealed that at some point during the night, Mr. Muñoz tied his sweater to a steel grate on the floor, looped it around his neck, and slowly twisted his body on the floor until he was dead by asphyxiation.

II. PROCEDURAL BACKGROUND

In order to better understand, and explain to the public, the circumstances of Mr. Muñoz's death, as well as the consequences of the administration's family separation policy, CAP requested the production of the following records within twenty (20) business days on June 26, 2018:

Any and all records which relate to Marco Antonio Muñoz's immigration status, arrest, claim for relief, detention, or subsequent death. Please search for records created between May 11, 2018 and the date on which the search is completed.

On June 28, 2018, the U.S. Department of Homeland Security (DHS) acknowledged receipt of the FOIA Request and assigned it tracking number 2018-HQFO-01153. DHS referred the Request to the FOIA offices for Immigration and Customs Enforcement (ICE) and CBP. On July 2, ICE acknowledged initial receipt of the Request and gave it the tracking number 2018-ICFO-4730. On July 17, ICE sent a communication concluding that portions of information sought were under the purview of CBP and referred the request to them. ICE never produced any additional records. Although CBP never acknowledged receipt of the request in writing, CBP provided tracking number CBP-2018-068460 on the December 18 call. On May 14, 2019—after

¹ Jasmine Garsd, "This is what the 'zero-tolerance' policy on the border means for people fleeing violence," Public Radio International, May 18, 2018.

² Kimberly Kindy, Nick Miroff and Maria Sacchetti, "Trump says ending family separation practice was a 'disaster that led to surge in border crossings,'" Washington Post, April 28, 2019.

³ Nick Miroff, "A family was separated at the border, and this distraught father took his own life," Washington Post, June 9, 2018.

⁴ Jeffery C. Mays and Matt Stevens, "Honduran Man Kills Himself After Threat of Family Separation at U.S. Border, Reports Say," N.Y. Times, June 10, 2018.

well over 300 days—CBP issued an interim response consisting of a single four-page Form I-213.

III. DHS AND CBP FAILED TO CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

The FOIA and applicable regulations require that DHS and CBP “conduct a search reasonably calculated to uncover all relevant documents” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). DHS and CBP failed to satisfy this duty, as evidenced by the failure to produce any and all electronic or written communications concerning the agency’s Use of Force against Mr. Muñoz, the transfer of Mr. Muñoz to Starr County Jail, as well as any and all records pertaining to his death, including any notifications, investigations, requests for comment by the media, talking points, press releases and related documents. Additionally, initial reports indicated that Texas law enforcement officials, including the Texas Rangers Division of the Texas Department of Public Safety, were involved in investigating the death of Mr. Muñoz. Accordingly, an adequate search should have included, at a minimum, communications and records exchanged between DHS and/or CBP and Texas law enforcement officials regarding that inquiry into the circumstances surrounding Mr. Muñoz’s death. But CBP’s production contained neither records evidencing that such a search was conducted, nor a claim that such materials would not be produced as exempt from disclosure under the FOIA. DHS provided no records whatsoever.

IV. CONCLUSION

For the foregoing reasons, DHS and CBP’s responses to CAP’s FOIA request are plainly inadequate. The agency failed to conduct an adequate search reasonably calculated to identify all responsive records. Supplemental searches should be undertaken.

Thank you for your immediate attention to this matter. We would prefer to correspond by email or telephone, rather than by mail, if possible. Should you have any questions or need further information about our request, please feel free to reach me at 202-682-0327 or tjawetz@americanprogress.org.

Thank you for your assistance.

Sincerely,

/s/ Tom Jawetz

Tom Jawetz

Vice President of Immigration Policy
Center for American Progress