



Thomas D. Homan, Director
U.S. Immigration and Customs Enforcement
500 12th Street
SW Washington, D.C. 20536

The Honorable Elaine C. Duke, Secretary
Department of Homeland Security
245 Murray Lane SW
Washington, D.C. 20528

Joseph B. Maher
Acting General Counsel
Department of Homeland Security
245 Murray Lane SW
Washington, D.C. 20528

CC: Ms. Margaret Hawkins
Director, Records Appraisal and Agency Assistance
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001
Request.Schedule@nara.gov

November 7, 2017

Re: Litigation Hold Order on Files Pertaining to Detainee Sexual Abuse, Assault, Death, and other Conditions and Practices That May Violate Clearly Established Statutory and Constitutional Rights

Dear Secretary Duke, Director Homan, and Mr. Maher:

Community Initiatives for Visiting Immigrants in Confinement ("CIVIC") and the Civil Rights Education and Enforcement Center ("CREEC") hereby notify the Department of Homeland Security ("DHS"), specifically its component agency U.S. Immigration & Customs Enforcement ("ICE"), to preserve all records, including electronically stored information, copies and backup, as defined by Rule 34 of the Federal Rules of Civil Procedure, along with any paper files which may be relevant to the below-referenced anticipated litigation. This litigation hold letter expressly serves to put DHS and ICE on notice that litigation in the below-detailed matters is reasonably anticipated. Therefore, we request that DHS and ICE preserve these records and suspend its regular document retention policy or any other internal proposal to destroy records relevant to the below-referenced anticipated litigation, pending discovery.

CIVIC is a national nonprofit headquartered in San Francisco, California, with a mission to abolish the U.S. immigration detention system. In addition to providing independent oversight of the U.S. immigration detention system, CIVIC also challenges immigration detention practices.

CREEC is a non-profit located in Denver, Colorado, with a nationwide scope whose mission includes investigating and filing impact and class-action lawsuits on a broad array of civil rights issues.

1. SCOPE OF RELEVANT DATA

Please be advised that CIVIC believes electronically stored information to be an important and irreplaceable source of discovery and/or evidence in regards to the below-referenced anticipated litigation. We request that you preserve all information from DHS' and ICE's computer systems, removable electronic media, and other locations. This includes, but is not limited to, email and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, and Internet files. DHS and ICE

Community Initiatives for Visiting Immigrants in Confinement (CIVIC)
P.O. Box 40677, San Francisco, CA 94140
www.endisolation.org

should also preserve the following platforms in the possession of the DHS and ICE or a third party under the control of the DHS and ICE (such as an employee or outside vendor under contract or intergovernmental service agreement): databases, networks, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, laptops, personal computers, internet data, personal digital assistants, handheld wireless devices, mobile telephones, paging devices, and audio systems (including voicemail). DHS and ICE should also preserve all paper and audio files. Data that falls within the below categories should be preserved for anticipated litigation:

Detainee Sexual Abuse and Assault Files:

On April 11, 2017, CIVIC filed a federal civil rights complaint with the Office for Civil Rights & Civil Liberties (CRCL), ICE, and the Department of Homeland Security (DHS) detailing the prevalence of reports of sexual abuse, assault, and harassment in U.S. immigration detention facilities and the lack of adequate government investigation into these reports.¹ For its complaint, CIVIC analyzed data obtained through a Freedom of Information Act (FOIA) request for sexual and physical assault data from the DHS Office of the Inspector General (OIG). CIVIC also filed FOIA's with CRCL and ICE, but received no adequate response from either office to its FOIAs. Our civil rights complaint is the last step in exhausting our administrative remedies. If we do not receive a sufficient response to our complaint from ICE or other DHS agencies, we are prepared to initiate litigation.

We also have filed federal civil rights complaints with the Office for Civil Rights & Civil Liberties (CRCL), ICE, and DHS on behalf of 20 people at the Etowah County Detention Facility in Alabama,² 10 people at Theo Lacy Facility in California,³ and 61 people at the Hudson County Jail in New Jersey⁴ who have been victims of physical abuse or substandard medical care. Although we have been able to implement significant changes at these facilities through our increased independent oversight, we have received no meaningful response from ICE or any other DHS component agency to any of these complaints, and we are in the process of developing a litigation strategy with regards to these issues as we continue to document disturbing related incidents.

Detainee Death Review Files

On May 8, 2017, CIVIC and Human Rights Watch published a 103-page report,⁵ revealing systemic medical failures, such as unreasonable delays in care and unqualified medical staff, that are likely to expose a record number of people to dangerous conditions under President Donald Trump's ramped-up deportation and detention plans. In the report, medical doctors analyzed 18 death review files from immigration detention, finding that substandard medical care contributed to 16 out of the 18 deaths. These unacceptable conditions are ongoing. In addition, CIVIC filed a federal civil rights complaint with the Office for Civil Rights & Civil Liberties (CRCL), ICE, and DHS, on April 1, 2016, regarding the unreported death of Mr. Teka Gulema at a hospital near the Etowah County Detention Facility.⁶ We have not received a sufficient response from ICE or any other DHS component agency to this complaint. We have been tracking similar death cases, and working with families of these individuals. Wrongful death lawsuits and class action litigation addressing these unconstitutional systemic failures may follow.

Weekly Detention Service Monitor Reports

These records may be relevant for a future lawsuit we file challenging conditions and practices that violate clearly established statutory and constitutional rights.

Alternative to Detention Emergency/Incident Records

These records may be relevant for a future lawsuit we file challenging conditions and practices that violate clearly established statutory and constitutional rights.

¹ <http://www.endisolation.org/sexual-assault>

² <http://www.endisolation.org/Etowah>

³ <http://www.endisolation.org/TheoLacy>

⁴ <http://www.endisolation.org/Hudson>

⁵ <http://www.endisolation.org/DetentionDeaths>

⁶ <http://www.endisolation.org/UnreportedDeath>

Detention Information Reporting Line Records

For CIVIC's 2017 complaint on sexual assault (see above), CIVIC also analyzed data regarding calls made to the ICE ERO Detention Reporting and Information Line (DRIL) between October 2012 and March 2016. This data would be relevant to the anticipated lawsuit on sexual assault and physical abuse.

Detainee Segregation/Solitary Confinement Case Files

These records may be relevant for a future lawsuit we file challenging conditions and practices that violate clearly established statutory and constitutional rights or for wrongful death lawsuits. For example, CIVIC was in touch with Jean Carlos Jiménez-Joseph,⁷ prior to his untimely death at the Stewart Detention Center after he was held in segregation for 19 days, which very may well have been in violation of ICE's Segregation Directive.⁸

Daily Detention Log

These records may be relevant for a future lawsuit we file challenging conditions and practices, including overcrowding resulting to increased abuse, that violate clearly established statutory and constitutional rights.

Residential Detainee Locator Files

These records may be relevant for a future lawsuit we file challenging conditions and practices that violate clearly established statutory and constitutional rights.

2. DUTY TO PRESERVE

Under federal law, "a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006). The duty attaches "from the moment that litigation is reasonably anticipated." *Apple Inc. v. Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012). Generally, a government agency or municipality will have a reasonable anticipation of litigation when it is on notice of a credible probability that it will become involved in litigation. For example, the duty to issue a litigation notice may be triggered when a government agency:

- Receives a demand letter, summons, complaint, or subpoena
- Sends or receives a cease and desist letter
- Receives notice of a government investigation
- Becomes aware of an accident or incident involving potential liability

An obligation to create a litigation hold can arise prior to the filing of a complaint. The duty to institute a litigation hold attaches when a party "reasonably anticipates" litigation to ensure the preservation of relevant documents. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y.2003). In *Zubulake*, an employment discrimination case, the plaintiff filed her EEOC charges on Aug. 16, 2001. However, the court found that the duty to institute a litigation hold arose in April 2001 because at that time everyone associated with the matter recognized the possibility that she might sue. *Phillip M Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009), is an even more dramatic example showing that the duty to institute a litigation hold arises before litigation is filed. In that case, the plaintiff's counsel wrote to the defendant in 2005 asserting patent infringement claims. However, the court found that the defendant had a duty to preserve evidence back to 1999-2000 because at that time class-action lawsuits had been filed against other computer manufacturers based on claims of computer defects that led to the plaintiff developing its patented technology. The court stated, "Throughout this entire time, computer and component manufacturers were sensitized to the issue In the 1999-2000 environment, [defendant] should have been preserving evidence related to floppy disk controller errors." *Id.* at 1191.

Likewise DHS and ICE should have been on notice already about the duty to preserve the above information. Although the mere existence of an administrative claim, such as CIVIC's federal civil rights complaints with CRCL, do not automatically put a federal agency on notice that litigation is "reasonably anticipated," there have been countless media reports about abuse, accidents, and deaths in immigration detention, and DHS's own records

⁷ <http://www.endisolation.org/blog/archives/1243>

⁸ https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf

indicate thousands of complaints from people in immigration detention in recent years. This alone should have been enough to sensitize DHS to the issue and put DHS on notice that these records must be preserved. However, ICE's recent petition to the National Archives and Records Administration (NARA) asking to eliminate the above referenced information has made it clear that DHS and ICE do not feel that they are on notice.

Therefore, this litigation hold letter now expressly serves to put DHS and ICE on notice that litigation in the above matters is reasonably anticipated.

3. SANCTIONS FOR SPOILATION

Spoilation is "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Where a party has violated its duty to preserve evidence and engaged in spoliation, federal courts have the inherent power to impose sanctions. See *Sherman v. Rinchem Co., Inc.*, 687 F.3d 996, 1006 (8th Cir. 2012) (citations omitted). Sanctions may include the following: monetary sanctions, an adverse inference jury instruction, striking claims or defenses, exclusion of evidence, and default or dismissal. See Rule 37 of the Federal Rules of Civil Procedure. And these sanctions can be applied to the federal government, as the law is fairly settled that once the United States arrives in federal court, it must abide by the Federal Rules of Civil Procedure like any other litigant. *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991); *Moseller v. United States*, 158 F.2d 380, 382 (2d Cir. 1946). Therefore, should DHS and ICE not preserve the above-referenced records, and litigation commences, DHS and ICE may be sanctioned for the spoliation of this evidence.

4. PRESERVATION COMPLIANCE

Activity Log

In order to show preservation compliance, DHS and ICE must maintain a log, documenting all alterations or deletions made to any paper files or electronic data storage device or any electronic data processing system. The log should include changes and deletions made by supervisors, employees, contractors, vendors, or any other third parties.

Data Created After This Letter

For any paper files or electronic data created after this letter or for any electronic processing systems used after this letter, DHS and ICE must take the proper steps to avoid destroying potentially relevant evidence. This includes preserving the information contained in section 1 of this letter.

Compliance with DHS' and ICE's preservation obligations includes forwarding a copy of this letter to all individuals or organizations that are responsible for any of the items referred to in this letter, including contract vendors.

Please confirm receipt of this letter by emailing Christina Fialho at CFialho@endisolation.org. If this correspondence is in any respect unclear, please contact us immediately.

Sincerely,



Christina M. Fialho, Esq.
Co-Founder/Executive Director
Community Initiatives for Visiting Immigrants in Confinement (CIVIC)



Tim Fox, Esq.
Co-Founder/Executive Director
Civil Rights Education & Enforcement Center (CREEC)