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FOIA Lawsuit Helps NPR Report On “Barbaric” and “Negligent” Conditions in ICE Detention Facilities

By Max Mishkin, Emmy Parsons, and David Bodney

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In August 2023, NPR and journalist Tom Dreisbach published a stunning investigative report about “secret inspection reports written by experts hired by the Department of Homeland Security’s Office for Civil Rights and Civil Liberties,” who examined immigrant detention facilities across the U.S. and “found ‘negligent’ medical care (including mental health care), ‘unsafe and filthy’ conditions, racist abuse of detainees, inappropriate pepper-spraying of mentally ill detainees and other problems that, in some cases, contributed to detainee deaths.” See Tom Dreisbach, [Government’s own experts found ‘barbaric’ and ‘negligent’ conditions in ICE detention](#), NPR (Aug. 16, 2023).

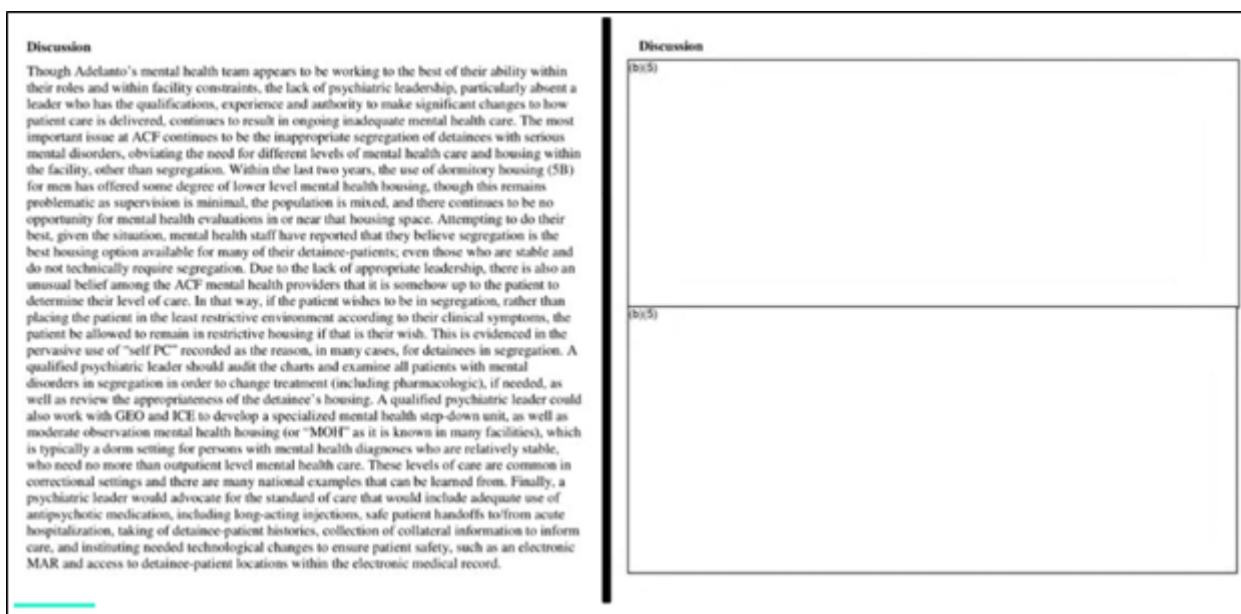
These records were released as the result of a Freedom of Information Act lawsuit in which the court compared the Government’s arguments to “a game of ‘Mad Libs.’” [NPR, Inc. v. DHS](#), No. 20-cv-2468-RCL, 2022 WL 4534730, at *8 (D.D.C. Sept. 28, 2022).

The Adelanto CRCL Report

In 2019, in response to an initial set of FOIA requests, NPR and the Project On Government Oversight (“POGO”) each received expert reports from the Department of Homeland Security’s (“DHS’s”) Office of Civil Rights and Civil Liberties (“CRCL”) describing site visits to the Immigration and Customs Enforcement (“ICE”) detention facility in Adelanto, California. As NPR reported, the Adelanto report revealed that the facility failed to meet ICE’s own standards for the use of solitary confinement and that problems with medical care at the facility likely contributed to the death and deformity of detainees. See Tom Dreisbach, [Despite Findings Of ‘Negligent’ Care, ICE To Expand Troubled Calif. Detention Center](#), NPR (Jan. 15, 2020).

The release of the records prompted outrage among policymakers. As the office of then-Senator Kamala Harris announced, “It is unconscionable to subject detained persons to inhumane conditions . . . including issues arising from insufficient medical care as well as prolonged isolation and detention at immigrant detention facilities.” Partly in response to these records, California passed a law largely banning the use of private contractors in prisons and immigration detention centers.

Moreover, by comparing the differently redacted copies of the reports received by NPR and POGO, the production also served as a powerful example of how federal agencies can abuse FOIA Exemption 5, which permits a federal agency to withhold “inter-agency or intra-agency memorandums or letters” that it would not have to produce to a litigation adversary in discovery:



Left: a page from the CRCL Adelanto report as produced to NPR; right: the same page as produced to POGO with redactions under Exemption 5

The CRCL FOIA Request and Lawsuit

Given the newsworthiness of the Adelanto report, NPR proceeded to request from DHS all such CRCL reports from 2014 through 2019, and DHS initially withheld more than 1,000 pages of those records in full under Exemptions 5 and 6. Following an administrative appeal process in which DHS largely appeared to ignore the appellate officer, NPR filed a FOIA lawsuit in the U.S. District Court for the District of Columbia in September 2020. DHS subsequently produced the 1,000 pages of responsive records, but with extensive redactions – indeed, the vast majority of the pages were withheld in full under Exemption 5.

DHS moved for summary judgment on its withholdings in December 2021, and NPR cross-moved (only as to Exemption 5) the following month. NPR principally argued that DHS’s blanket Exemption 5 withholdings were improper because (1) the deliberative process privilege generally does not protect purely factual information; and (2) DHS failed to articulate how release of the records would cause “reasonably foreseeable” harm. DHS responded that what it called “unverified observations of first impression” were deliberative, not factual, and that release would cause harm by impeding investigations and “confusing” the public.

In September 2022, U.S. District Judge Royce C. Lamberth denied DHS’s motion and granted NPR’s cross-motion. As the court explained, DHS had improperly withheld inarguably factual information, including “the square footage per detainee, the ratio of toilets to detainees, the ratio of washbasins to detainees, and the ratio of showers to detainees at a detention facility.” *NPR*, 2022 WL 4534730, at *6 (cleaned up). The court then went a step further and concluded that DHS had failed to carry its burden under the “foreseeable harm” standard as to any of its Exemption 5 withholdings, finding that DHS had offered only “boilerplate recitations” and that its arguments resembled “a game of ‘Mad Libs’” where DHS simply “filled in the blanks with the name of the agency and the things that it does.” *Id.* at *8. Judge Lamberth therefore ordered DHS to re-process the records without the Exemption 5 withholdings.

The Lawsuit’s Resolution and NPR’s Reporting

Though DHS noticed an appeal from Judge Lamberth’s ruling, it abandoned that appeal in March 2023. *NPR, Inc. v. DHS*, No. 22-5311, 2023 WL 2717669 (D.C. Cir. Mar. 27, 2023). DHS subsequently re-processed and re-produced the 1,000 pages of responsive records without the Exemption 5 withholdings, along with an additional 600 pages of responsive records that the agency belatedly located. DHS further agreed to pay \$75,000.00 to NPR for its attorneys’ fees, and the litigation was dismissed by agreement of the parties in July 2023.

The following month, NPR published an investigative report that drew on the “trove of more than 1,600 pages” obtained through the FOIA lawsuit. See Tom Dreisbach, [A ‘shocking’ 911 call and other key takeaways from NPR’s ICE detention investigation](#), NPR (Aug. 24, 2023). Among others commenting on the investigative effort, U.S. Rep. Pramila Jayapal called NPR’s reporting “heartbreaking but incredibly damning.”

Plaintiffs NPR and Tom Dreisbach were represented by David J. Bodney, Maxwell S. Mishkin, and Emmy Parsons of Ballard Spahr LLP and Micah Ratner and Rachel Seller of NPR.

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