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VIA ELECTRONIC AND CERTIFIED MAIL

Ms. Margaret Hawkins
Director
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**Re: Comments to ICE Document Destruction Proposal (NARA-2017-054;
Control Number DAA-0567-2015-0013)**

Dear Ms. Hawkins,

The undersigned organizations submit the following comments in response to the records schedule proposed by the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) (Control Number DAA-0567-2015-0013), 82 FR 32585.

Based on its submission to your office, ICE proposes a records schedule that includes the destruction of eleven sets of records related to people detained in its custody as well as detention operations. The documents include incidents of sexual abuse and assault, escapes, solitary confinement and deaths, as well as logs and reports on the status of people in detention, facility monitoring, telephone rates charged to people in detention and alternatives to detention. The time period proposed for the destruction of records ranges from three years for records about the use of solitary confinement to 20 years in the case of records related to deaths and sexual assaults in detention.

We are deeply concerned with ICE's proposal and the National Archives and Records Administration's (NARA) provisional approval of that proposal. We urge your office to reconsider its approval of ICE's records schedule. The records in question document the operation of a vast detention system impacting the lives of hundreds of thousands of people, in which there is a great need for transparency and accountability. These documents have current and future value for the government and for private persons directly affected by the government's activities, as well as legal, research and historical value.

The Immigration Detention System

Although it barely existed before the early 1980s, the immigration detention system has grown enormously in the last two decades.¹ Immigration and Customs Enforcement, the agency responsible for managing the detention system, only began operating in 2003 following the passage of the Homeland Security Act in 2002. Between FY 1995 and FY 2013, the average daily detention population of ICE and its predecessor agency more than quadrupled, and the number of people passing through ICE detention each year increased from 85,730 to 440,557.² In 2015, the ICE detention system swelled even further with the addition of nearly 3,000 family detention beds. The detention system further increased in size in the final months of the Obama administration, and the Trump administration has sought funding for further increases. Today, the U.S. immigration detention system is the largest in the world.

ICE detention is intended to be civil and non-punitive: its purpose is not to punish, but simply to secure appearance at immigration proceedings and transport for removal when applicable.³ Nevertheless, ICE detention facilities overwhelmingly consist of jails and jail-like facilities, many of which are owned and operated by local sheriff and police departments.⁴ Additionally, about 60 percent of people in the detention system are in facilities operated by private, for-profit prison companies—an industry that has fought against public accountability for its actions while accumulating a long and disturbing history of abuse, neglect, and misconduct.⁵

The U.S. immigration system has been at the center of public and media scrutiny over the last several years, drawing criticism from U.S. and international groups. In just the past six months, reports by advocates have addressed a multitude of human and civil rights abuses in detention including inadequate medical care, isolation, prolonged detention, physical and verbal abuse, and

¹ See American Civil Liberties Union, *Shutting Down The Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, at 7 (Sept. 2016) available at https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

² Doris Meissner, et al., Migration Policy Institute, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, at 126 (Jan. 2013), available at

<http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>; John F. Simanski, Dep't of Homeland Security, Office of Immigration Statistics, *Annual Report, Immigration Enforcement Actions: 2013* (Sept. 2014), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

³ Dora Schriro, *Immigration Detention Overview and Recommendations*, at 2-3 (Oct. 6, 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>

⁴ Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, at 7-12 (Oct. 6, 2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>.

⁵ See, e.g., Grassroots Leadership & Justice Strategies, *For-Profit Family Detention: Meet the Private Prison Corporations Making Millions by Locking Up Refugee Families* (Oct. 2014), available at <http://grassrootsleadership.org/sites/default/files/uploads/For-Profit%20Family%20Detention.pdf>; American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* (June 2014), available at <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>; Sentencing Project, *Too Good to Be True: Private Prisons in America* (Jan. 2012), available at http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf; American Civil Liberties Union, *Banking on Bondage: Private Prisons and Mass Incarceration* (Nov. 2011), available at https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

lack of basic sanitation and nutrition, among others.⁶ Recently, the Inter-American Commission on Human Rights expressed its concern over deaths in U.S. immigration detention centers as well as abusive conditions of confinement.⁷

Many of the records that ICE proposes for destruction have served as the basis for research and literature offering proof of the mistreatment endured by people in detention, including sexual abuse, excessive use of solitary confinement, and death. These documents have become the foundation for creating systems of accountability and oversight through government and public action. The records in question have been essential for the media and the public to understand, investigate and evaluate the U.S. immigration enforcement system.

Furthermore, the records scheduled to be destroyed under this proposal include documents that reveal important actions by federal officials—sexual abuse, solitary confinement, and deaths in custody all implicate serious questions of accountability.

Even if NARA reaffirms its decision to classify all such records as temporary, the proposed destruction schedules are likely to impede impacted individuals and members of the public from seeking legal accountability for violations of their rights and seeking public accountability for government actions. In some cases, documents will be retained for just three years—shorter than the statute of limitations for some legal claims arising from harms suffered while detained. Many state statutes of limitations for actions involving injury to person or property exceed three years, and some are as long as ten years. Setting a destruction schedule that is shorter than an applicable statute of limitations is inherently incompatible with NARA’s goal of ensuring legal accountability. If NARA authorizes documents to be destroyed before ten years have elapsed, then if someone suffers abuse in ICE custody and then files a lawsuit over that abuse, the short destruction timeline could cause the relevant documents to be destroyed before the lawsuit even begins.

Additionally, any destruction schedules must take into account the reality that—notwithstanding the twenty-day statutory deadline—ICE and other DHS components sometimes take multiple years to provide final responses to Freedom of Information Act (FOIA) requests.⁸ Because these

⁶ See, e.g., Human Rights Watch and Community Initiatives for Visiting Immigrants in Confinement, *Systemic Indifference: Dangerous and Substandard Medical Care in U.S. Immigration Detention* (May 2017), available at <https://www.hrw.org/news/2017/05/08/us-detention-hazardous-immigrants-health>; Project South and Pennsylvania State Law Center for Immigrants’ Rights Clinic, *Imprisoned Injustice: Inside Two Georgia Immigration Detention Centers* (May 2017), available at <http://projectsouth.org/press-release-report-on-georgia-immigration-detention-centers/>; Southern Poverty Law Center, National Immigration Project of the National Lawyers Guild and Adelante Worker Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 2016), available at <https://www.splcenter.org/news/2016/11/21/new-splc-report-uncovers-abuse-and-neglect-immigrant-detention-centers-south>.

⁷ Organization of American States, *Inter-American Commission on Human Rights Press Release* (Aug. 11, 2017), available at http://www.oas.org/en/iachr/media_center/PReleases/2017/119.asp.

⁸ To take two examples: The ACLU submitted a FOIA request to the DHS Office of Civil Rights and Civil Liberties regarding the use of solitary confinement by ICE on March 12, 2015, but did not receive a final response until more than two years later, on June 13, 2017. FOIA Request to DHS CRCL, No. 2015-CRFO-00014. Similarly the ACLU

responses can result in administrative appeals, and at times litigation challenging the completeness of the agency's search for documents, a destruction schedule shorter than five years could also result in destruction of documents that are the subject of a pending FOIA request. This would interfere with public accountability for DHS.

While we are concerned with ICE's request in its entirety, we highlight below several issues of particular importance where NARA's designation of the records as temporary and subject to destruction would be a significant detriment to impacted individuals and to government and public oversight of the detention system.

Deaths in Detention

ICE proposes to destroy records documenting the deaths of people in its custody after 20 years. This proposed records schedule includes: "comprehensive reports on findings from reviews of circumstances surrounding detainees deaths includ[ing], but are not limited to, investigative reports, correspondence, witness statements, extracts of pertinent information, immigration records, medical records, photographs, video and voice recordings, death certificates, and autopsy reports."

There have been over 170 deaths in immigration detention since 2003, including ten deaths since October 2016. A full accounting of these deaths is available today only because of Freedom of Information Act requests submitted by the ACLU and investigative reporting by *The New York Times* from 2007 to 2010. These investigations revealed that ICE not only failed to accurately keep track of who had died in the agency's custody, but that the agency actively sought to cover up some deaths by deflecting inquiries and providing misleading answers to reporters.⁹ These and subsequent investigations by leading media organizations—including *The New York Times*, *Washington Post*, *PBS Frontline*, and *CBS 60 Minutes*—revealed that ICE provided life-threatening, substandard medical care to those in its custody in scores of other cases.¹⁰

It was not until 2009 that ICE created the Office of Detention Oversight (ODO) and tasked this internal body with investigating each death in custody and producing a report documenting this review. The reports generated by ODO, as well as the appendices, exhibits, and other attachments stored with the final reports, are the documents slated to be destroyed under ICE's

submitted a FOIA request to ICE seeking a limited subset of the agency's recent death reviews on November 3, 2015, but did not receive a final response until May 24, 2017. FOIA Request to ICE, No. 2016-ICFO-08798.

⁹ Nina Bernstein, *Documents Reveal Earlier Immigrant Deaths*, N.Y. TIMES (Jan. 9, 2010), <https://nyti.ms/2xT9NOK>; Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), <https://nyti.ms/2mDSKx7>.

¹⁰ See, e.g., Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES (June 26, 2007), <https://nyti.ms/2k57hRb>; Dana Priest and Amy Goldstein, WASH. POST (May 11 -14, 2008) <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>; Rick Young, Margaret Ebrahim, and Catherine Rentz, "Lost in Detention," (Oct. 18, 2011), <http://www.pbs.org/wgbh/frontline/film/lost-in-detention/>; Scott Pelley, "Detention in America," (Feb. 11, 2009), <http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml>.

proposal. These files represent a significant accumulation of documentary material that both evaluates and documents whether ICE's actions leading up to each death were appropriate. This documentary material is compiled from many different sources that would not otherwise be stored in a single place, and it records important conclusions that are not retained elsewhere by the agency. These investigation files have received widespread attention from the media and are recognized as a uniquely important resource by human and civil rights defenders, immigrants' rights advocates and journalists. They have also played an important role in wrongful death litigation against ICE and its contractors.

Indeed, subsequent advocacy efforts to reform ICE detention have relied heavily on these reports. In February 2016, the ACLU, Detention Watch Network, and the National Immigrant Justice Center published a detailed report, *Fatal Neglect*, detailing ICE's ongoing failure to abide by its own medical care standards that relied heavily on ODO death reviews from 2010 to 2012 and the appendices, exhibits, and other attachments stored with the final reports. In May 2017, Human Rights Watch and Community Initiatives for Visiting Immigrants in Confinement (CIVIC) published a report, *Systemic Indifference*, that similarly used ODO death reviews from 2012 to 2015, which enabled independent medical experts to determine that substandard medical care contributed to seven out of the ten deaths examined.¹¹

The ODO reports and their appendices, exhibits, and attachments are of such importance to the ACLU that—even before learning of ICE's destruction proposal—the ACLU already had a pending FOIA request to ICE regarding its destruction/retention policies for these materials.¹² The ACLU is currently awaiting a response from ICE to this request.

The documents in this category are incredibly important for the families and communities whose loved ones died while in U.S. government custody. Furthermore, for historical purposes, the classification of these documents as temporary is not appropriate given that they represent a high-value accumulation of hard-to-find documentary material, record conclusions not stored elsewhere by ICE, have received significant media attention, and are widely recognized among human and civil rights defenders, immigrants' rights advocates and journalists as providing a unique window into the operation of the detention system that has come under great scrutiny and has claimed so many lives.

Telephone Access

ICE proposes to destroy records related to telephone use and access after three years. Specifically, the records schedule includes: “records of detainee telephone rates charged at various ICE facilities, and commission payments received by facilities. Records include analysis of legal issues associated with high telephone rates and commission schemes at facilities.

¹¹ *Id.* at 6

¹² ICE FOIA Case Number 2017-ICFO-29196.

Analysis of Federal Communication Commission order on interstate inmate calling services, including public comments and recommendations for ICE role in enforcement.”

In many detention facilities, limited and expensive telephone access compounds isolation from family members, community and legal assistance. The ACLU is recently settled a class action lawsuit in Northern California to secure adequate telephone access for detainees, so that they can contact attorneys and pro bono legal service providers and collect evidence in support of their immigration cases while in detention.¹³ Calls from these facilities are subject to temporal and technical barriers that make it difficult to communicate with attorneys and government agencies, and are often prohibitively expensive—ranging from \$3.75 to \$9.50 for a ten-minute long-distance call within California.¹⁴ Many of these high telephone rates are driven by so-called “commission” payments, in which the telephone company pays the detention facility a significant share of its per-minute revenue. This system of commission payments was harshly criticized by the FCC in a recent rate regulation order¹⁵ and has been called a system of “kickbacks” by advocates.¹⁶ However, the FCC was forced to rescind the regulation in July 2017 as a result of litigation by the telephone companies. Especially in light of the withdrawal of the FCC regulations, it is likely that there will be continued litigation regarding telephone rates and services in ICE custody in the coming years.

The records proposed for destruction consist of factual information regarding telephone rates and commission fees as well as legal analysis of whether these rates and fees are lawful. In the ACLU’s recent lawsuit in Northern California, Plaintiffs requested these records in discovery. However, the agency completely withheld them as privileged legal memoranda.¹⁷ Because these are legal memoranda that guided agency officials on the interpretation of existing laws and regulations, and because the factual materials document agency procedures on a matter of significant public concern, they should be permanently preserved.

Sexual Abuse and Assault

ICE proposes to destroy detainee sexual abuse and assault files after 20 years including: “records relating to sexual abuse and assault between detainees as well as by employees, contractors, or volunteers against detainees. Records include, but are not limited to statistical data on sexual assaults, information papers, case summaries, and extracts of pertinent information.”

¹³ See *Lyon v. U.S. Immigration & Customs Enforcement*, 300 F.R.D. 628 (N.D. Cal. 2014).

¹⁴ ACLU of Northern California, Press Release, “ACLU Sues ICE Over Unfair Telephone Policy” (Dec. 19, 2013), available at <https://www.aclunc.org/news/aclu-sues-ice-over-unfair-telephone-policy>.

¹⁵ Federal Communications Commission, Report and Order and Further Notice of Proposed Rulemaking, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-113A1.pdf.

¹⁶ Drew Kukorowski, Peter Wagner & Leah Sakala, Prison Policy Initiative, *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry* (May 2013), available at https://static.prisonpolicy.org/phones/please_deposit.pdf

¹⁷ See ICE’s Responses and Objections to Plaintiffs’ Third Request for Production of Documents, *Lyon v. ICE*, No. 13-cv-5878 (N.D. Cal. June 16, 2015) (on file with the ACLU).

There has been sustained public pressure and reporting on the issue of sexual assault and abuse in immigration detention facilities, which continues to be a serious, pervasive problem. A 2013 report by the Government Accountability Office examined 215 allegations of sexual abuse and assault in ICE detention facilities from October 2009 through March 2013 and found that detained individuals face severe challenges in reporting abuse.¹⁸ Even when individuals do report allegations, many local ICE offices fail to inform headquarters as required.¹⁹

More recently, in its complaint filed with the DHS Office for Civil Rights and Civil Liberties in April 2017, Community Initiatives for Visiting Immigrants in Confinement (CIVIC) determined that more complaints of sexual abuse and assault were submitted against ICE than any other DHS agency.²⁰ According to data obtained through a FOIA request, the DHS Office of Inspector General (OIG) received 1,016 reports of sexual abuse filed by people in detention between May 2014 and July 2016, meaning that the OIG received on average more than one complaint of sexual abuse from people in detention per day during this time period. The group also found that the OIG investigated only 24 of those complaints, or 2.4% of the total.²¹

It is important to note that because these sexual abuse and assault allegations occur in a confined environment that is monitored and controlled by ICE, Customs and Border Protection (CBP), and other DHS components, the allegations necessarily involve actions and decisions by federal officials even where the alleged perpetrator is not an agency employee.

In addition to public oversight, the documents in this category are especially important for government evaluation and compliance with federal law. Although passed in 2003, DHS only finalized regulations implementing the Prison Rape Elimination Act (PREA) in 2014. The standards require that all DHS facilities and all contract facilities used for immigrant detention comply with the PREA regulations. These regulations set forth a zero-tolerance policy for any sexual abuse of people in immigrant detention; establish mandatory training for all staff; and require that every facility undergo at least one outside audit for PREA compliance every three years. The regulations also establish oversight and limitations on the use of isolation on vulnerable populations and alleged victims of sexual abuse; prohibit cross-gender searches of women; and, of particular importance to transgender and intersex people, they prevent examination solely for the purpose of determining genital characteristics.²²

¹⁸ Government Accountability Office, *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, GAO-14-38 (2013), available at <http://www.gao.gov/assets/660/659145.pdf>.

¹⁹ *Id.*

²⁰ Community Initiatives for Visiting Immigrants in Confinement (CIVIC), *Complaints to DHS Office for Civil Rights & Civil Liberties* (Apr. 11, 2017), available at <http://www.endisolation.org/sexual-assault>.

²¹ *Id.*

²² See Dep't of Homeland Security, *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 79 FED. REG. 13100 (Mar. 7, 2014), codified at 6 C.F.R. Part 115.

In January 2017, ICE produced a report to Congress summarizing its progress toward implementing the regulations.²³ Although not fully implemented in all of the facilities that ICE uses, various detention facilities are currently undergoing required PREA audits. The agency states that it expects to complete the initial round of audits by July 8, 2018. These ongoing audits will serve as an important record of ICE operations and implementation of the law. The auditors and government officials who are evaluating ICE's compliance in this area will most certainly require the various records noted in the proposed schedule including previous records of audits, case summaries and statistics, as well as information about the agency's efforts to ensure that the regulations are fully implemented across all of its detention facilities.

ICE documents about sexual abuse and assault in custody have been critically important for developing the law and policy addressing the need to prevent and end these abuses in detention. As such, they provide an important record of the government's investigations into this issue and the process for developing oversight mechanisms to ensure that reports of sexual abuse are thoroughly investigated and that the agency is taking full measures to prevent sexual abuse in detention. As a part of the record of the government's actions on an issue of great public interest and concern, and that is subject to regular evaluation under the law, the documents in this category are not properly classified as temporary.

Solitary Confinement

ICE proposes to destroy records about its use of solitary confinement after three years. These records include, "case files documenting segregated detainees which includes final report summarizing case details." One of our immediate concerns with documents in this category is that these records have significant legal value especially to victims of solitary confinement who may want to seek legal redress for violations of their rights. Such a shortened time frame for preserving records about solitary confinement may impede legal accountability in those cases.

Additionally, the destruction of these records will eliminate a unique source of information about a governmental practice that has received widespread condemnation and is likely to change significantly in the coming decades. In March 2013, a front-page *New York Times* article described the widespread and inappropriate use of solitary confinement in ICE detention.²⁴ This led to significant congressional interest in reforming the use of solitary confinement in ICE detention, and the final version of the Senate's 2013 comprehensive immigration reform bill included a section limiting the use of solitary confinement in immigration detention.²⁵ In

²³ Dep't of Homeland Security Immigration and Customs Enforcement, *Progress in Implementing 2011 PBNDS Standards and DHS PREA Requirements at Detention Facilities* (Jan. 17, 2017), available at <https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards.pdf>.

²⁴ Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), available at http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0.

²⁵ S.744, 113th Congress, § 3717 (2013).

September 2013, ICE issued a new segregation policy directive establishing stricter policies and procedures for the use and monitoring of solitary confinement in ICE detention facilities.²⁶ Specifically, the new policy substantially increases ICE headquarters' monitoring of solitary confinement and sets important limits on its use, especially for vulnerable populations such as individuals with mental disabilities and alleged victims of sexual assault.

A key unanswered question, however, is whether the monitoring process is working as contemplated, and whether ICE is using the information it now collects to reduce solitary confinement. Because ICE has not made any information publicly available that would allow Congress, NGOs, or other government agencies to evaluate the agency's progress in implementing the directive, the records set to be destroyed under this destruction schedule are unique, not provided in aggregate form in annual reports to Congress, and may be the only source of agency records available to answer this question.

Recent media reports based on documents obtained through FOIA requests indicate that even four years after ICE issued its policy directive, serious problems with the use of solitary confinement in immigration detention persist.²⁷ Over the course of 2016, for example, ICE segregation logs recorded more than 300 instances of the use solitary confinement in just three ICE detention facilities. Some of the reasons noted for the use of solitary confinement include physical and mental health diagnoses and as retribution for participating in hunger strikes.²⁸

The proposed records schedule authorizes ICE to destroy these records on a schedule so aggressive that it will be difficult for the public and the government to track how the agency's use of solitary confinement shifts over time. This will both make it more difficult for government officials to evaluate the long-term impacts of ICE's own policies and deprive future historians of information about how these practices did (or did not) change at a time of increasing public pressure.

We urge the National Archives and Records Administration to reconsider its initial approval of the proposed ICE records schedule. The designation of many of these documents as temporary and subject to destruction on such short timelines does not account for the needs of the public, impacted individuals and government officials to conduct necessary, and in some cases required, evaluation of ICE detention operations. As described above, many of the records in this schedule have significant legal, research and historical value. They address major policy or procedural changes, are subjects of extensive litigation, constitute unique materials on a particular matter,

²⁶ U.S. Immigration and Customs Enforcement, *Policy Directive 11065.1: Review of the Use of Segregation for ICE Detainees* (Sept. 4, 2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

²⁷ Spencer Woodman, ICE Detainees are Asking to be put in Solitary Confinement for Their Own Safety, THE VERGE (Mar. 10, 2017), available at <https://www.theverge.com/2017/3/10/14873244/ice-immigrant-detention-solitary-trump-corecivic-geo>.

²⁸ *Id.*

have received widespread media attention and offer a critical window into the treatment of immigrants in the United States. Based on these considerations, the records warrant continued preservation.

Thank you for your attention to our comments.

Respectfully submitted,

American Civil Liberties Union

American Immigration Lawyers Association

Community Initiatives for Visiting Immigrants in Confinement

Detention Watch Network

Human Rights Watch

Just Detention International

National Immigrant Justice Center

Southern Poverty Law Center

Women's Refugee Commission