



November 24, 2020

MEMORANDUM FOR: Tony H. Pham
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

Jonathan Fahey
Principal Legal Advisor
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FROM: Peter E. Mina (b)(6)
Deputy Officer for Programs and Compliance
Office for Civil Rights and Civil Liberties

Robert O'Malley /s/
Attorney Advisor, Legal Counsel Division
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SUBJECT: Otero County Processing Center
Complaint Nos. 20-08-ICE-0708, 21-02-ICE-0100,
21-02-ICE-0097, 21-02-ICE-0096, 21-02-ICE-0095,
And 19-09-ICE-0663

The Office for Civil Rights and Civil Liberties (CRCL) has opened complaints alleging abuses of the civil rights and civil liberties of individuals in the custody of U.S. Immigration and Customs Enforcement (ICE) at the Otero County Processing Center (Otero) in Otero, New Mexico. The purpose of this memorandum is to notify you of the complaints, describe the allegations, inform you that CRCL will retain the above-referenced complaints for investigation and conduct a virtual onsite investigation at Otero, and to explain how CRCL will work with ICE during our investigation. As part of this investigation, and consistent with the authority described in the CRCL and Scope of Review sections below, CRCL will examine the allegations described in the complaints, and Otero's operations more generally, to determine if the individual allegations are indicative of systemic civil rights and civil liberties issues.

ALLEGATIONS

1. Complaint No. 20-08-ICE-0708

On May 21, 2020, CRCL received correspondence from Congresswoman Xochitl Torres Small dated May 19, 2020. Rep. Torres Small requested that CRCL investigate the conditions of detention at Otero. Rep. Torres Small's letter alleged that Otero is "failing to protect the health and safety of

both migrants and staff, and problems that existed prior to the COVID-19 pandemic have since been exacerbated by the outbreak of the virus.” Rep. Torres Small also raised concerns about the availability of hygiene products and inadequate cohorting and quarantine practices. Specifically, she raised the following allegations:

- Although detainees “received soap upon their initial arrival; replacement soap was only available for purchase” and that as COVID-19 spread throughout the country “Otero frequently ran out of soap.”
- “individuals with flu-like symptoms are being cohorted in a single segregation unit without ensuring all individuals are COVID-19 positive. This is contrary to the guidance issued by the Centers for Disease Control and Prevention which states the best practice is to isolate confirmed positive cases away from those who have not been tested positive for the virus.”
- Otero “has not been following proper quarantine procedures and fails to respond to requests for medical care in a timely manner.”

2. *Complaint No. 21-02-ICE-0100*

On June 16, 2020, (b)(6), an ICE detainee at Otero, called the Office of Inspector General (OIG) hotline to report that he was quarantined for 15 days upon arrival with others already in quarantine for COVID 19. According to the complaint, Otero houses new detainees arriving at the facility in the quarantine unit with detainees currently under quarantine, potentially exposing them to COVID-19 and further extending their stay in the unit.

3. *Complaint No. 21-02-ICE-0097*

On July 1, 2020, an anonymous ICE detainee housed at Otero called the OIG hotline to report that Otero comingles detainees who have tested positive for COVID-19 with detainees who have tested negative for the virus or have not been exposed. The unnamed detainee further alleged that too many people are being placed together in cells and therefore the virus is not being controlled. In addition, the detainee alleged that his July 1, 2020, court date was cancelled because detainees, including him, placed in quarantine.

4. *Complaint No. 21-02-ICE-0096*

On May 6, 2020, CRCL received an email referral from DHS OIG regarding (b)(6) an ICE detainee at Otero who alleged retaliation for reporting an assault by an officer. Specifically, Mr. (b)(6) claims that an officer pushed him and two other detainees as they were exiting a room. He alleged that when one of the detainees reported the incident to a supervisor, his personal items were moved and he was placed in a segregation cell. Mr. (b)(6) further stated that when he inquired about the detainee’s move, he too was placed in segregation. In addition, Mr. (b)(6) alleged that ventilation in the segregation cell is poor and problematic for him because he has asthma. He also reported that the cell was too cold, there was no shower, it was not clean, and he did not have any of his personal items.

5. *Complaint No. 21-02-ICE-0095*

On February 20, 2019, CRCL received an email referral from the DHS OIG regarding (b)(6) [REDACTED], an ICE detainee at Otero who alleged that custody staff failed to respond to an incident in which a detainee became sick and vomited on January 11, 2019. Specifically, he reports that detainees notified an officer of the detainee's illness and it took two hours for the detainee to be moved by medical staff. The officer who was made aware of the sick detainee reportedly laughed when told. Mr. (b)(6) [REDACTED] also reported delays in responses to medical care requests and alleged that detainees who have "attacks" at night are assigned to sleep on top bunks, which poses a danger to them.¹ Mr. (b)(6) [REDACTED] also reported small food portions and issuance of dirty clothes.

6. *Complaint No. 19-09-ICE-0663*

On June 6, 2019, CRCL identified an article posted on TIME.com discussing Johana Medina Leon, a 25-year-old ICE detainee at Otero who died in an El Paso hospital within days of her release from ICE custody. According to the June 4, 2019, article titled "A Transgender Asylum Seeker Has Died After Being Released From ICE Custody," Ms. Leon requested asylum on April 11, 2019, at a border crossing and on May 18, she was determined to have a credible fear claim. On May 28, Ms. Leon was sent to the hospital due to complaints of chest pain and was released from ICE custody shortly thereafter.

7. *Complaint No. 19-06-ICE-0216*²

On March 25, 2019, CRCL received email correspondence signed by representatives of the American Civil Liberties Union (ACLU) of New Mexico, the Las Americas Immigrant Advocacy Center, and the Santa Fe Dreamers Project alleging sexual harassment, discrimination, and abuse of LGBTQ detainees at Otero; inadequate medical care; staff retaliation against gay men and transgender women who have complained about detention conditions; and improper use of segregation. In the letter, they alleged that the facility denied requests to provide hormone treatment to three transgender women who had been taking hormones for gender dysphoria and that facility staff are slow to respond to requests for medical care, including mental health care submitted by transgender women and gay men –stating that it "takes days, if not weeks," for staff to respond to their medical and mental health care requests. The March 25, 2019, letter also alleged that transgender women were sexually harassed because they must bathe and sleep in housing units with male detainees who sexually harass and threaten them, including propositioning them for sex and that male detainees reportedly "leer[] at [transgender women] offering to 'help' them bathe. ... Other men ask women for sex while they try to sleep." In addition, the letter claimed that correctional officers subject gay men and transgender women to frequent pat-down searches and that they are subjected to frequent homophobic and transphobic slurs from other detainees that are unaddressed by

¹ The correspondence did not specify what "attacks" meant.

² This complaint is closed. CRCL initiated an investigation of these allegations on May 21, 2019 and issued to ICE a request for information. ICE responded on August 6, 2019, providing copies of policies, grievance, and incident reports. CRCL issued an Expert Recommendation Memorandum on July 30, 2020. See CRCL Expert Recommendation Memorandum for Complaint 19-06-ICE-0216, to Enrique M. Lucero Executive Associate Director Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, from Peter E. Mina, Deputy Officer, Office for Civil Rights and Civil Liberties (Jul. 30, 2020); see also Complaint No. 20-5-ICE-0405, closed on other grounds, (detainee expressed concern that she was being discriminated against because she is transgender and reported that a nurse disclosed the detainee's medical information to detention staff and laughed about her medical complications.)

facility staff. Relatedly, they also allege that correctional officers make transphobic comments such as, “Walk like a man! You better sit like a man!”³

AREAS TO BE REVIEWED

CRCL plans to review the following areas of the facility’s operations because they raise important civil right and civil liberties considerations: medical care, mental health care, suicide prevention, detainee safety, segregation, the grievance system, and environmental health and safety. CRCL will also look at corrections generally to ensure that the issues raised are not systemic to the overall operation of the facility.

CRCL

CRCL Mission. CRCL supports the Department's mission to secure the Nation while preserving individual liberty, fairness, and equality under the law. CRCL integrates civil rights and civil liberties into all the Department's activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners;
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns;
- Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel;
- Leading the Department's equal employment opportunity programs and promoting workforce diversity and merit system principles.

CRCL authorities. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL is charged with investigating and assessing complaints against DHS employees and officials of abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion. In investigating complaints, if CRCL believes that the complaints raise similar issues, CRCL may look into whether there are systemic problems that justify a broader investigation. Pursuant to its authority under 6 U.S.C. § 345(a)(3), CRCL shall assist components to “periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities.”⁴ Additionally, pursuant to DHS Delegation Number 19003, issued October 26, 2012, the Secretary has delegated to the Officer of CRCL the authority to “assess new and existing policies throughout the Department for the

³ *Id.* CRCL’s conditions of confinement expert reviewed the materials provided by ICE and found operational deficiencies related to grievances. These grievances included complaints regarding disciplinary action, segregation, staff mistreatment, language access, medical services, dental services, religious discrimination, safety, sexual abuse and assault prevention and intervention of LGBTQ detainees as well as non LGBTQ detainees.

⁴ In addition, pursuant to 42 U.S.C. § 2000ee-1(a)(2), CRCL has the authority to “periodically investigate and review department, agency, or elements actions, *policies, procedures, guidelines*, and related laws and their implementation to ensure that such department, agency, or element is adequately considering privacy and civil liberties in its actions.” (emphasis added)

policies' impact on civil rights and civil liberties" and "review . . . programs within any Component to ensure compliance with standards established by the Officer for CRCL to protect civil rights and civil liberties." Issues such as appropriate treatment by ICE officials, access to medical care, lack of arbitrary punishment, and religious accommodation for ICE detainees are examples that may raise civil rights and liberties concerns. The procedures for our investigations, and the recommendations they may generate, are outlined in DHS Management Directive 3500, DHS Instruction 046-01-001, and DHS Instruction 046-01-002.

Access to information. 42 U.S.C. § 2000ee-1(d) grants this Office access to the "information, material, and resources necessary to fulfill the functions" of the office, including the complaint investigation function; Management Directive 3500 further authorizes CRCL to:

- "Notify[] the relevant OHS component(s) involved of the matter and its acceptance by CRCL, and whether the matter will be handled by CRCL or by the component organization;"
- "Interview[] persons and obtain[] other information deemed by CRCL to be relevant and require[e] cooperation by all agency employees;" and
- "Access[] documents and files that may have information deemed by CRCL to be relevant."

Further guidance is contained in DHS Instruction 046-01-002, and, pursuant to section 3.3 of ICE Directive 8010.1, "Administration and Management of Inquiries from the Office for Civil Rights and Civil Liberties," this is a request for information or assistance. Under section 3.3 of Directive 8010.1, ICE will provide the requested information and materials to CRCL within the timeframe indicated below, and not edit or otherwise limit review of the information that is responsive to CRCL's request. Pursuant to section 2 of Directive 8010.1, CRCL understands that this request will be handled by the appropriate ICE program office or ICE's Office of Diversity and Civil Rights (ODCR).

Reprisals forbidden. In addition, 42 U.S.C. § 2000ee-1(e) forbids any Federal employee to subject a complainant or witness to any "action constituting a reprisal, or threat of reprisal, for making a complaint or for disclosing information to" CRCL in the course of this investigation.

This memorandum and its accompanying request for information are made pursuant to these authorities.

Privilege and required transparency. Our communications with ICE personnel and documents generated during this review, particularly the final report, will be protected to the maximum extent possible by attorney-client and deliberative process privileges. Under 6 U.S.C. § 345(b), however, we submit an annual report to Congress-also posted on CRCL's website-that is required to detail "any allegations of [civil rights/civil liberties] abuses . . . and any actions taken by the Department in response to such allegations."

We look forward to working with your staff on this matter and will report back to you our findings and any recommendations.

SCOPE OF REVIEW

The purpose of this review is to determine if the allegations in the complaints can be verified or disproven, determine whether the facts suggest that the Constitution, a federal statute, or a Departmental policy has been violated, and to recommend what steps, if any, should be taken by ICE to address the complaints both individually (if the problem is ongoing) and as a matter of policy. This review will also examine the additional areas specified above for similar concerns related to protection of civil rights and civil liberties. It is our goal to produce a report that will assist in making ICE the best agency possible.

QUESTION(S) PRESENTED

(b)(5)

INITIATING THE INVESTIGATION

CRCL Policy Advisors (b)(6) will be handling this review. We request that ICE ERO schedule an initial discussion about this complaint and CRCL’s plans for reviewing the matter with Ms. (b)(6) as soon as possible.

We look forward to working together to determine all the facts surrounding this matter and if appropriate, the best way forward. If you have any questions, please do not hesitate to contact Ms. (b)(6) by phone at (b)(6) or by email at (b)(6)

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