

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

MICHIGAN IMMIGRANT RIGHTS  
CENTER, DR. GEOFFREY ALAN  
BOYCE, DR. ELIZABETH  
OGLESBY, and AMERICAN CIVIL  
LIBERTIES UNION OF MICHIGAN,

Plaintiffs,

vs.

Case No.

Hon.

Mag. J.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY and  
UNITED STATES CUSTOMS AND  
BORDER PROTECTION,

Defendants.

**COMPLAINT**

**INTRODUCTION**

1. This case concerns the public's right to know about United States Customs and Border Protection ("CBP") policies and practices that treat the entire state of Michigan as a "border zone."

2. Federal law authorizes CBP agents to conduct certain warrantless searches of vehicles "within a reasonable distance from any external boundary of the United States . . . for the purpose of patrolling the border to prevent the illegal entry" of non-citizens. 8 U.S.C. § 1357(a)(3).

3. The relevant regulations provide that CBP can determine what a “reasonable distance” is based on local factors, but that the distance shall not be more than 100 air miles from an international boundary. 8 C.F.R. § 287.1(b). That maximum distance is called the “100 mile zone.”

4. In Michigan, CBP has not only set the “reasonable distance” for the entire state at the maximum 100 miles, but also considers the entire state to be within 100 miles of an international boundary, and hence within the “100 mile zone.”

5. Under this interpretation, CBP agents patrolling the “border” could potentially subject anyone in Michigan – regardless of where he or she is within the state – to warrantless detention and search.

6. In order for the public, policymakers and the courts to evaluate the proper scope of warrantless searches conducted by CBP and to examine whether it is “reasonable” for CBP to define the entire state of Michigan as a border zone, it is critical that more information be made publicly available about CBP’s extensive but largely opaque interior enforcement operations in Michigan, and particularly about CBP’s interpretation and application of its authority within the “100 mile zone.”

7. On May 21, 2015—over 18 months ago—Plaintiffs Michigan Immigrant Rights Center (“MIRC”), Dr. Geoffrey Alan Boyce, Dr. Elizabeth

Oglesby and American Civil Liberties Union of Michigan (“ACLU”) (collectively “Plaintiffs” or “Requestors”) submitted a request to CBP under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking records related to U.S. Border Patrol’s interior enforcement operations in the Detroit Sector<sup>1</sup> for Fiscal Years 2012 through 2014. The records that Plaintiffs seek include relevant agency policies, stop and detention records, apprehension logs, and complaint records. A true and correct copy of the FOIA request is attached hereto as Exhibit A, and thereby incorporated by reference.

8. To date, and long past the statutory deadline to respond, Defendants have failed to provide a legally adequate response to Plaintiffs’ request for records, necessitating this action under FOIA, 5 U.S.C. § 552, for declaratory, injunctive and other appropriate relief.

9. The only documents that Defendants have released to date – heavily redacted Border Patrol apprehension logs – highlight how much is unknown and why public access to the requested records is so important, particularly given the current national conversation about immigration enforcement.

10. Data culled from those logs shows that in the Detroit Sector:

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<sup>1</sup> For comparison purposes, Plaintiffs also seek some records from the Buffalo and Tucson sectors. The Detroit sector includes Michigan and parts of Ohio.

- 31 percent of people processed by Border Patrol for whom citizenship is recorded – almost one in three – are United States citizens;
- Almost 40 percent of people processed are either U.S. citizens or foreign citizens lawfully in the United States.
- Less than 2 percent of foreign citizens processed are listed as having a criminal record;
- Just over 5 percent of foreign citizens processed are recent border crossers who arrived in the United States during the preceding 30 days; and
- Over 63% of those apprehended were initially stopped by other agencies, like local police.

11. Without a full response to Plaintiffs' FOIA request, important questions will remain unanswered, including:

- Where Border Patrol stops are occurring in Michigan and how far they are from an international border;
- Why Border Patrol is processing so many United States citizens and so many people who are lawfully in the United States;
- What percentage of all stops and what percentage of U.S. citizen stops are of people of color, and what policies or procedure Border Patrol has to prevent racial profiling;

- Whether recent border crossers came in through the U.S.-Canada border (which Border Patrol in the Detroit sector is supposed to protect) or the southern border; and
- Which other agencies are calling in Border Patrol, the reason those agencies are calling Border Patrol, and how often those other agencies detain United States citizens and other people who are legally in the United States in order to call in Border Patrol.

12. Through this lawsuit, Plaintiffs seek the immediate processing and release of agency records that should have been provided in response to the FOIA request properly made by Plaintiffs but that were improperly withheld by Defendants United States Department of Homeland Security (“DHS”) and U.S. Customs and Border Protection (“CBP”).

### **JURISDICTION AND VENUE**

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706.

14. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff American Civil Liberties Union of Michigan has its principal place of business in Detroit, Michigan.

15. Plaintiffs have exhausted all available administrative remedies in connection with their FOIA request.

## **PARTIES**

16. Plaintiff Michigan Immigrant Rights Center is a legal resource center for Michigan's immigrant communities. MIRC's mission is to build a thriving Michigan where immigrant communities are fully integrated and respected. MIRC fulfills this mission in various ways including the provision of education and training about immigration law, leading systematic advocacy to advance the rights of low-income immigrants and their families, and promoting respect and understanding among immigrants and receiving communities.

17. MIRC disseminates information about government policies and practices affecting immigrants via a variety of media including its website, social media and an email newsletter service. The MIRC website ([michiganimmigrant.org](http://michiganimmigrant.org)) provides extensive information about immigration-related issues. The website includes a library of materials used by community advocates, including a database of documents previously obtained through FOIA from Immigration and Customs Enforcement.

18. Dr. Geoffrey Alan Boyce is a National Science Foundation Postdoctoral Research Fellow at the School of Geography and Development, at the University of Arizona, which is an educational institution. He has conducted research supported by the National Science Foundation, the Tinker Foundation, the ConfluenCenter for Creative Inquiry, and the University of Arizona Social and

Behavioral Sciences Research Institute. His research work has covered a number of topics, including international relations, transnational migration and U.S. immigration policy. He has had peer-reviewed work published in scholarly journals including: *Geopolitics; Area; Territory, Politics and Governance; Environment and Planning D*; as well as the University of Georgia Press. Dr. Boyce has professional training in qualitative and mixed-methods research; statistical data analysis; and Geographic Information Systems (GIS).

19. Dr. Elizabeth Oglesby is an Associate Professor in the School of Geography and Development and the Center for Latin American Studies at the University of Arizona, which is an educational institution. Dr. Oglesby's research focuses on issues related to immigration, globalization and labor, human rights, and Central America. Dr. Oglesby has published peer-reviewed work in a number of scholarly venues including *Environment and Planning D; Space and Polity; Geoforum*; and Duke University Press. Dr. Oglesby has also served as editor of the *Central America Report*, a weekly bulletin of economic and political news analysis published by Inforpress Centroamericana in Guatemala City; an associate editor for the *NACLA Report on the Americas*, the largest circulating English-language publication of Latin American affairs; and a correspondent for *Latinamerica Press*, a hemispheric news service based in Lima, Peru.

20. Plaintiff American Civil Liberties Union of Michigan is a non-profit, non-partisan 26 U.S.C. § 501(c)(4) organization dedicated to protecting civil liberties and human rights in Michigan. The ACLU is committed to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status, and that the government respects civil rights. The American Civil Liberties Union of Michigan, which has thousands of members and supporters in Michigan, is the state affiliate organization of the national American Civil Liberties Union (“National ACLU”).

21. Dissemination of information to the public about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. Specifically, the ACLU publishes blogs, reports, fact sheets, news briefings, “Know Your Rights” documents and other educational and informational materials that are designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and civil liberties. These ACLU publications often include descriptions and analyses of information obtained from the government through FOIA requests. These publications are widely available to the public for no cost or for a nominal fee. The websites of the ACLU of Michigan ([aclumich.org](http://aclumich.org)) and the National ACLU ([aclu.org](http://aclu.org)) address civil rights and civil



liberties issues in depth and contain many thousands of documents relating to the issues on which the ACLU is focused.

22. Defendant United States Department of Homeland Security (“DHS”) is a Department of the Executive Branch of the United States Government. DHS is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). DHS includes United States Customs & Border Protection. DHS has possession and control over the records sought by Plaintiffs. DHS is headquartered in Washington, D.C.

23. Defendant United States Customs and Border Protection (“CBP”) is an agency of the United States Department of Homeland Security. CBP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). It is headquartered in Washington D.C., and has field offices throughout the country. United States Border Patrol, which has responsibility for securing the borders of the United States, is a sub-agency within CBP. CBP and/or Border Patrol has possession and control over the records sought by Plaintiffs.

#### **FACTUAL BACKGROUND REGARDING BORDER PATROL OPERATIONS**

24. Border Patrol’s interior enforcement operations are a matter of pressing public concern. Since 2006, the U.S. Border Patrol has nearly doubled in

size, from approximately 12,000 agents to over 21,000 today.<sup>2</sup> The budget for U.S. Customs and Border Protection, of which Border Patrol is a sub-agency, has more than doubled from \$6.4 billion in Fiscal Year (“FY”) 2005 to \$13.9 billion in FY 2017.<sup>3</sup> In particular, Border Patrol’s Detroit Sector has grown from 38 agents in FY 2001 to 411 agents in FY 2015 – a 981 percent increase, the fastest rate of growth of any Border Patrol sector in the United States during the same time period.<sup>4</sup> As the agency has expanded, complaints of Border Patrol abuses in the Great Lakes region,<sup>5</sup> and throughout the nation,<sup>6</sup> have increased.

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<sup>2</sup> DEP’T OF HOMELAND SEC., FY 2017 BUDGET IN BRIEF 4 (2016) <https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf> (last visited Nov. 16, 2016).

<sup>3</sup> *See* DEP’T OF HOMELAND SEC., FY 2006 BUDGET IN BRIEF 15 (2006) [https://www.dhs.gov/sites/default/files/publications/Budget\\_BIB-FY2006.pdf](https://www.dhs.gov/sites/default/files/publications/Budget_BIB-FY2006.pdf) (last visited Sept. 22, 2016); DEP’T OF HOMELAND SEC., FY 2017 BUDGET IN BRIEF 10 (2016) [https://www.dhs.gov/sites/default/files/publications/FY2017\\_BIB-MASTER.pdf](https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf) (last visited Nov. 16, 2016).

<sup>4</sup> *See* UNITED STATES BORDER PATROL BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2015), *available at* <https://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2015.pdf> (last visited Nov. 16, 2016).

<sup>5</sup> *See* *Hebshi v. United States*, 12 F. Supp. 3d 1036 (E.D. Mich. 2014) (alleging, inter alia, discrimination based on race, ethnicity, or national origin by CBP at the Detroit airport); Jenna Greene, *In Human Rights Suits, Activists Target Border Protection Agency*, NAT’L L.J., March 13, 2013, <http://www.cardozo.yu.edu/sites/default/files/In%20Human%20Rights%20Suit,%200Activists%20Target%20Border%20Protection%20Agency.pdf>; FAMILIES FOR FREEDOM, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED

25. The scope of Border Patrol's interior enforcement operations is defined by federal statute and regulations, as interpreted by the federal courts.

26. By statute, Border Patrol has authority to conduct certain warrantless searches "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(3).

27. The statute also provides that such searches may be conducted within "a reasonable distance" of the border. *See id.*

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STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), *available at* <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf>.

<sup>6</sup> From 2011-2014, complaints involving CBP received by the DHS Office of Civil Liberties and Civil Rights increased by nearly fifty percent. *See* DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, "DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED," *available at* [www.dhs.gov/departments-wide-data-complaints-received](http://www.dhs.gov/departments-wide-data-complaints-received) (last visited Nov. 16, 2016). Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported. *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE, GAO-14-38 at \*3(Nov. 2013), *available at* <http://gao.gov/assets/660/659145.pdf> (last visited Nov. 16, 2016).

28. That distance is defined by decades-old administrative regulations to be a maximum of “100 air miles” from any external boundary.<sup>7</sup> *See* 8 C.F.R. § 287.1(b).

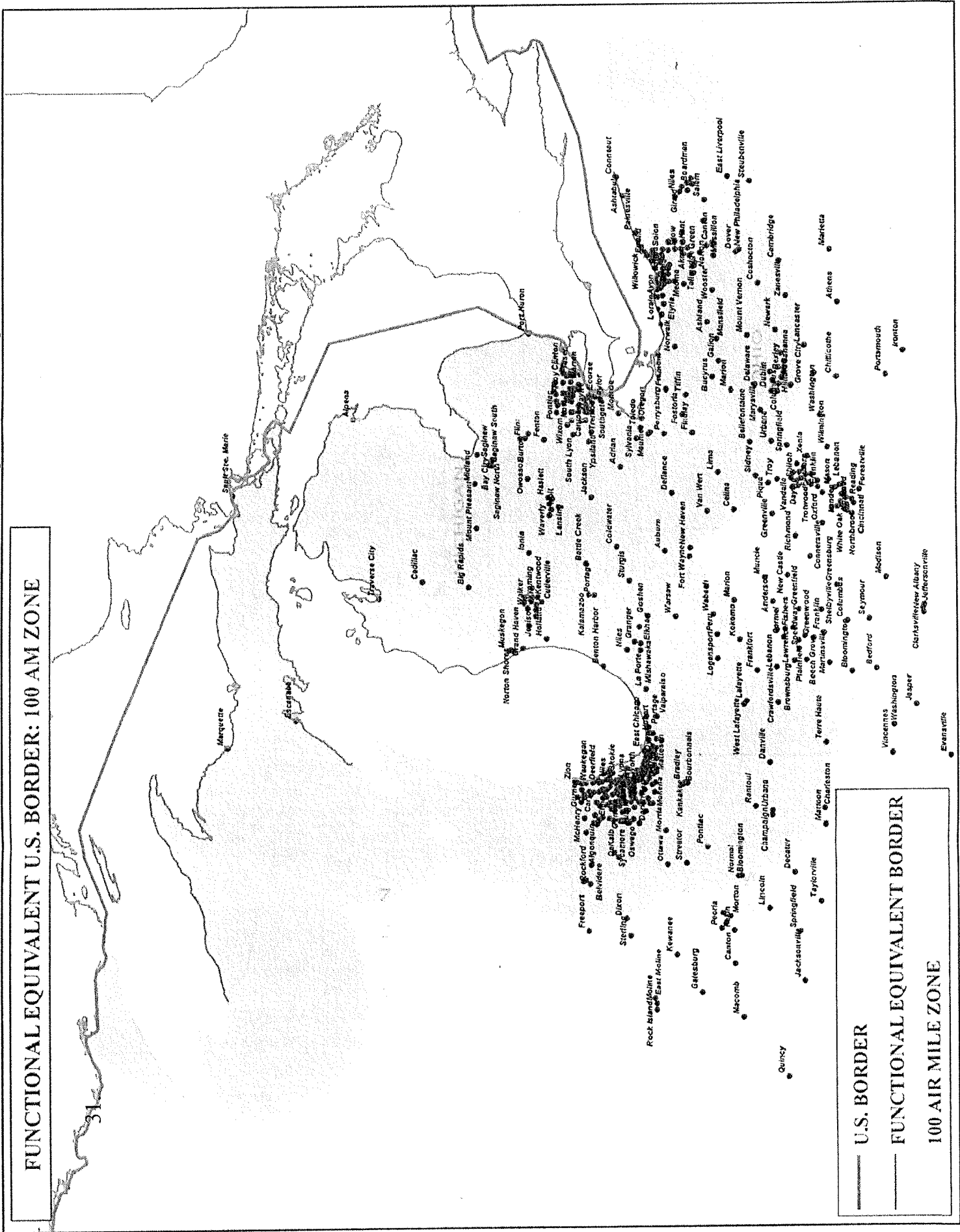
29. Under the regulations, CBP may fix a shorter distance based on local factors, such as topography and population density. *Id.*

30. A map prepared by CBP and obtained by Plaintiffs shows that CBP uses 100 miles as the “reasonable distance” everywhere in the state. The map also shows that CBP considers the entire state of Michigan to be within the 100-mile zone. That map is reproduced below.

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<sup>7</sup> *See United States v. Brignoni-Ponce*, 422 U.S. 873, 882–883 (1975) (“The only formal limitation on that discretion [to stop vehicles] appears to be the administrative regulation defining the term ‘reasonable distance’ in § 287(a)(3) to mean within 100 air miles from the border.”).

FUNCTIONAL EQUIVALENT U.S. BORDER: 100 AM ZONE



U.S. BORDER  
 FUNCTIONAL EQUIVALENT BORDER  
 100 AIR MILE ZONE

32. Based on the map, it appears CBP believes that no warrant is needed for Border Patrol agents to detain and search vehicles anywhere in the state.

33. Very little information is publicly available regarding Defendants' application of the 100-mile zone within Michigan, or the extent to which Border Patrol is conducting warrantless searches and seizures far from Michigan's border with Canada.

34. Indeed, very little information is publicly available regarding the extent or impact of Border Patrol interior enforcement operations anywhere in the country. For example, over the past five years neither Border Patrol nor DHS has disclosed the total number or location of Border Patrol interior checkpoints.<sup>8</sup> The Government Accountability Office ("GAO") has described numerous problems with Border Patrol's internal monitoring of checkpoint operations, including "information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management's ability to monitor the need for program improvement."<sup>9</sup>

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<sup>8</sup> *The Arizona Republic* estimated several years ago that there are approximately 170 Border Patrol checkpoints nationwide. See Bob Ortega, *Some in Town to Monitor Border Patrol Checkpoint*, ARIZ. REP., Feb. 26, 2014, available at <http://bit.ly/N3QTfu>.

<sup>9</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE

35. Border Patrol does not release stop data or other information related to interior enforcement operations. Although it is clear the Border Patrol's warrantless detention and searches sometimes extend even further than 100 miles into the interior of the country,<sup>10</sup> very little is known about the extent of Border Patrol's application of the 100-mile zone.

36. What little is publicly known has been revealed primarily through FOIA requests and litigation.

37. For example, an examination of the Border Patrol arrest records obtained through litigation for the Sandusky Bay station in Ohio, conducted by Dr. Kara Joyner, a Professor of Sociology at Bowling Green State University, found that Latinos made up 85% of Border Patrol arrests in 2009, 67% of arrests in 2010, and 62% of arrests in 2011.<sup>11</sup> In contrast, Latinos make up only three percent of the

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CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824 at \*28, (Aug. 2009), *available at* <http://www.gao.gov/products/GAO-09-824>.

<sup>10</sup> See, e.g., David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553, 556–60 (2012) (describing numerous roving patrol stops occurring more than 100 miles from the border).

<sup>11</sup> See Encarnacion Pyle, *Alleging Profiling, OSU Students Help Sue Border Patrol* COLUMBUS DISPATCH, Nov. 19, 2014, *available at* <http://www.dispatch.com/content/stories/local/2014/11/18/OSU-students-help-sue-Border-Patrol.html> (last visited Nov. 16, 2016).

population of the Sandusky Bay region.<sup>12</sup> Although the Sandusky region borders Lake Erie, less than one percent of those stopped by Border Patrol in the Sandusky station were Canadian.<sup>13</sup>

38. Similarly, in 2012 the ACLU of Washington filed a class action lawsuit on behalf of multiple individuals subjected to racial profiling in Border Patrol roving patrol operations on the Olympic Peninsula in Washington State. Border Patrol settled the case in September 2013, agreeing to re-train agents on their obligations under the Fourth Amendment and to share stop data with the ACLU.<sup>14</sup>

39. In January 2013, following extensive FOIA litigation, Families for Freedom issued a report disclosing a Border Patrol “incentives program” and documenting the Border Patrol’s arrests of hundreds of immigrants with legal status in interior enforcement operations.<sup>15</sup> A prior report, *Justice Derailed*, issued

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See “Settlement Reigns in Border Patrol Stops on the Olympic Peninsula,” (Sept. 24, 2013), *available at* <https://www.aclu.org/news/settlement-reins-border-patrol-stops-olympic-peninsula> (last visited Nov. 16, 2016).

<sup>15</sup> See FAMILIES FOR FREEDOM, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS (Jan. 2013), *available at* <http://bit.ly/1bjjh8h>. CBP denied the existence of documents responsive to



by the New York Civil Liberties Union (“NYCLU”) and based on the same FOIA request, disclosed data related to thousands of Border Patrol stops aboard public transportation in upstate New York.<sup>16</sup> The vast majority of those stops occurred far from the border, with only one percent resulting in initiation of removal proceedings; many involved violations of agency guidelines, including improper reliance on race, or resulted in the arrest of lawfully-present individuals.

40. Federal jurists have for decades expressed concern that Border Patrol’s interior operations result in widespread rights violations, and have questioned the expansion of Border Patrol’s interior enforcement operations.<sup>17</sup>

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plaintiffs’ FOIA request for more than a year before finally producing them. The report notes, “Contrary to sworn statements submitted in the federal district court stating that the agency did not maintain an array of arrest statistics, including annual totals for the Rochester Station, the depositions ordered by the Court revealed that arrest statistics are the primary measure employed by local USBP stations and their Sector supervisors in the Buffalo Sector.”

<sup>16</sup> See NYCLU, JUSTICE DERAILED (Nov. 2011), *available at* <http://bit.ly/N7A03q>.

<sup>17</sup> See, e.g., *United States v. Soto-Zuniga*, 837 F.3d 992, 998-99 (9th Cir. 2016) (holding that because there are serious questions about the constitutionality of Border Patrol checkpoints, the district court abused its discretion in denying discovery regarding the number and types of arrests and vehicle searches at a checkpoint because that information was relevant to determining the constitutionality of the checkpoint where the defendant was arrested); *United States v. Garcia*, 732 F.2d 1221, 1229 (5th Cir. 1984) (Tate, J., dissenting) (“Quite unfortunately, we have the opportunity only to review the successful guesses of these agents; we are never presented with the unconstitutionally intrusive stops of Hispanic residents and citizens that do not result in an arrest. Differentiating the

41. Information about Border Patrol's interior enforcement practices is critical to an informed debate within both the legal community and broader public about whether Border Patrol's authority to conduct warrantless searches and stops can or should extend far into the interior of the country, both as a matter of constitutional law and as a matter of public policy.<sup>18</sup>

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United States from police states of past history and the present, our Constitution in its Fourth Amendment prohibition against unreasonable searches protects all our residents, whether middle-class and well-dressed or poor and disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the highways of this nation.”). By contrast, several courts have allowed Border Patrol operations even beyond the 100 mile limit. *See, e.g., United States v. Pacheco-Espinosa*, 354 F. Supp. 2d 1219, 1223-24 (D.N.M. 2003) (“Current regulations interpret ‘reasonable distance’ as 100 air miles from the border. The Tenth Circuit has nevertheless held that the regulation does not foreclose searches beyond that limit...this Court determines that the approximately 120-mile distance in which Defendant was stopped was a reasonable distance from the border.”) (citations omitted); *United States v. Orozco*, 191 F.3d 578, 584 (5th Cir. 1999) (Dennis, J., dissenting) (“As I read *Brignoni-Ponce*, the Supreme Court’s authorization of roving Border Patrol stops on the basis of reasonable suspicion is limited to such stops within the 100 mile border zone created by 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1. It would be unreasonable to assume that the Supreme Court meant to dilute the protections of the Fourth Amendment so as to authorize the Border Patrol to make suspicion-based roving patrol stops anywhere in the United States. The Court’s opinion indicates no such intention.”).

<sup>18</sup> *E.g., Moving the Line of Scrimmage: Re-Examining the Defense-In-Depth Strategy: Hearing Before H. Subcomm. On Border and Maritime Sec., 114th Cong. (2016).*

42. As set out in the introduction, the limited information released by Defendants to date in response to Plaintiffs' FOIA request only raises more questions.

43. Without the release of all of the documents Plaintiffs have requested, the public will remain unaware of the impact of the Border Patrol enforcement operations being conducted in Michigan, and of the extent to which the Border Patrol is conducting warrantless detentions and searches throughout the entire state.

### **PLAINTIFFS' FOIA REQUEST**

44. On May 21, 2015, Plaintiffs submitted their FOIA request by email to Defendant CBP's FOIA Officer/Public Liaison Sabrina Burroughs at [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). Attached as Exhibit B is a true and correct copy of the email submitting the FOIA request.

45. On information and belief, Defendant received the FOIA request on May 21, 2015.

46. Also on May 21, 2015, Plaintiffs mailed a hard copy of the Request to CBP's FOIA Officer/Public Liaison via certified U.S. mail.

47. Plaintiffs requested expedited processing of the FOIA request on the grounds that there is a "compelling need" for release of the requested records, because the information therein is urgently needed by organizations primarily

engaged in disseminating information to inform the public about Border Patrol activities. *See* 5 U.S.C. § 552(a)(6)(E); 6 C.F.R. § 5.5.(d)(1)(ii).

48. Plaintiffs requested a full waiver of all fees, explaining that disclosure of the requested records “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government,” and further asserting that disclosure is “not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k)(1).

49. Plaintiffs also sought a waiver of all processing (search and review) fees because the ACLU and MIRC qualify as “representatives of the news media” and Dr. Boyce and Dr. Oglesby qualify as representatives of the news media. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1), (k).

50. On July 13, 2015, after receiving no response to the FOIA request, Plaintiffs submitted the FOIA request again through the FOIA Online System. Attached as Exhibits C and D are the true and correct copies of, respectively, the FOIA Online System submission and the FOIA Online System receipt.<sup>19</sup>

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<sup>19</sup> The resubmitted FOIA request was assigned tracking number CBP-2015-042176. There are several different FOIA tracking numbers related to this case, including CBP-2015-036215 (upon information and belief the tracking number assigned to the FOIA submitted on May 21, 2015) and CBP-OBP-2015-036215 (upon information a belief the tracking numbers assigned when the FOIA was reassigned from CBP to the Office of Border Patrol). *See* 10/21/2015, Email from CBPFOIA@cbp.dhs.gov to Miriam Aukerman (Exhibit M) (stating CBP-2015-

## PROCESSING OF PLAINTIFFS' FOIA REQUEST

51. On October 6, 2015, ACLU attorney Miriam Aukerman received an email from CBPFOIA@cbp.dhs.gov stating that the request for expedited processing had been denied. The only reason given was: "Does not meet requirements per DHS regulations." Attached as Exhibit E is a true and correct copy of that email.

52. On October 14, 2015, Ms. Aukerman appealed the rejection of the request for expedited processing. Attached as Exhibit F is a copy of that appeal letter (minus the signature).

53. On October 21, 2015, Ms. Aukerman received an email from CBPFOIA@cbp.dhs.gov stating that: "Your request for Fee Waiver for the FOIA request CBP-2015-042176 has been determined to be not applicable as the request is not billable." Attached as Exhibit G is a true and correct copy of that email.

54. On November 19, 2015, Plaintiffs appealed Defendants' failure to make a timely determination of the FOIA request and reiterated the appeal of the denial of expedited processing. Attached as Exhibit H is a true and correct copy of

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042176 is a duplicate to 2015-036215); 10/30/2015 Email from CBPFOIA@cbp.dhs.gov to Miriam Aukerman (Exhibit N) (stating CBP-2015-036215 had its tracking number changed to CBP-OBP-2015-036215); 10/26/2016 Aukerman Email (seeking clarification on case numbers and noting that on-line system was not allowing access to CBP-2015-036215) (Exhibit O).

that appeal, which was submitted by certified mail and via the FOIA on-line system.

55. On January 12, 2016 the CBP FOIA Division submitted an initial response to Plaintiffs' FOIA request. See Exhibit I, CBP's initial response to Plaintiffs' FOIA request.

56. In response to Section A of Plaintiffs' FOIA request (daily apprehension logs), Defendants produced 4,624 pages of documents, all but two pages of which were partially redacted, allegedly pursuant to the FOIA exemptions found at 5 U.S.C. § 552(b)(6), (b)(7)(C) and (b)(7)(E).

57. CBP produced no documents in response to Section B (documents showing individual stops and detentions), Section C (policy and procedure documents related to interior enforcement), or Section D (complaint documents) of the FOIA request. CBP indicated that it would be working on producing documents in response to sections C and D. With respect to Section B, CBP proposed producing only one in ten of the requested documents.

58. CBP did not provide any additional information related to Plaintiffs' request for a fee waiver or Plaintiffs' appeal of the denial of expedited processing.

59. By letter sent by e-mail and certified postal mail to DHS's Associate General Counsel and DHS's FOIA Officer dated February 29, 2016, Plaintiffs appealed CBP's withholding of information from Section A and failure to produce

any documents responsive to Section B, C or D of the FOIA request. Plaintiffs explained that the ten percent production approach for Section B is inadequate, but offered to negotiate a production schedule. That administrative appeal is attached to this Complaint as Exhibit J and is incorporated by reference.<sup>20</sup>

60. On information and belief, CBP received Plaintiffs' letter of appeal on March 9, 2016.

61. On May 9, 2016, Shari Suzuki, Chief of FOIA Appeals, Policy, and Litigation Branch, administratively closed Plaintiffs' appeal "because CBP's FOIA Division and the Border Patrol are still actively processing their response to the initial FOIA request." That administrative closure is attached to this Complaint as Exhibit K and is incorporated by reference.

62. On September 30, 2016, Ms. Suzuki wrote Ms. Aukerman in response to the appeals of the denial of expedited processing that the Plaintiffs had submitted almost a year earlier, on October 14, 2015 and November 19, 2015. The appeal on expedited processing was denied. In addition, the letter stated that

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<sup>20</sup> Plaintiffs also notified CBP's FOIA division, through a letter sent by certified mail, the FOIA on-line system, and electronic mail, that Plaintiffs would no longer accept service of correspondence or notification of production of documents through the FOIA online system because, despite Plaintiffs' repeated efforts to bring problems with the online system to the attention of CBP's FOIA Division, those problems were not rectified. *See* 2/26/2016 Aukerman Letter (Exhibit P).

problems with the FOIA Online system could not be remedied in order to allow Plaintiffs to track the progress of the FOIA online. Finally, the letter stated that the appeal of the constructive denial of the FOIA request was moot because the agency had released some documents on January 12, 2016. That letter is attached to this Complaint as Exhibit L.

63. To date, Plaintiffs have not received any documents (other than the redacted apprehension logs) that are responsive to their request.

64. Defendants have wrongfully withheld requested records from Plaintiffs.

65. On information and belief, Defendants have failed to make reasonable efforts to search for responsive records.

66. Plaintiffs have exhausted the applicable administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

## **CAUSES OF ACTION**

### **VIOLATIONS OF THE FREEDOM OF INFORMATION ACT**

67. Plaintiffs repeat, re-allege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

68. Defendants have failed to make a reasonable effort to search for records sought by the Request, and that failure violates FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations, *see* 6 C.F.R. § 5.4.



69. Defendants have failed to promptly make available the records sought by the Request, and that failure violates FOIA, 5 U.S.C. § 552(a)(6)(A), and Defendant's corresponding regulations *see* 6 C.F.R. § 5.6.

70. Defendants have violated 5 U.S.C. §552(a)(3) by withholding and redacting disclosable records in its possession that are not exempt from disclosure under 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C), 552(b)(7)(E).

71. Defendants have violated 5 U.S.C. §552(a)(3) by removing information from documents relating to Entry Landmark, Arrest Landmark, Apprehending Officer's Assigned Station, and Event Number, citing 5 U.S.C. § 552(b)(7)(E). The requested information is not exempt under 5 U.S.C. § 552(b)(7)(E).

72. Defendants have violated 5 U.S.C. §552(a)(3) by removing information from documents relating to Apprehending Officer Names, citing 5 U.S.C. §§ 552(b)(6), (b)(7)(C). The requested information is not exempt under 5 U.S.C. §§ 552(b)(6), (b)(7)(C).

73. Defendants have failed to grant Plaintiffs' request for a waiver of search, review, and duplication fees, and that failure also violates FOIA, 5 U.S.C. § 552(a)(4), and corresponding regulations, *see* 6 C.F.R. §§ 5.6(c), 5.11(k).

74. Defendants have failed to grant Plaintiff's request for a limitation of fees, and that failure violates FOIA, 5 U.S.C. § 552(a)(4), and corresponding regulations, *see* 6 C.F.R. §§ 5.6(c), 5.11(d).

### REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this court:

75. Declare that Defendants' failure to timely respond to Plaintiffs' FOIA Request; to conduct a reasonable search; to waive or limit search, review and duplication fees; and to fully disclose all requested records without redactions is unlawful;

76. Issue an injunction ordering Defendants to immediately disclose the requested records and to make copies available to Plaintiffs at no charge;

77. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

78. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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Michigan

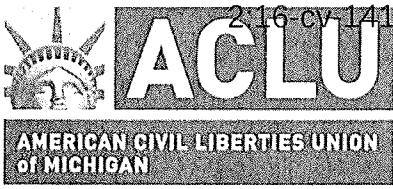
Dated: November 30, 2016

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- C. Resubmission of May 21, 2015 FOIA through FOIA Online System (July 13, 2015)
- D. FOIA Online System Receipt for Resubmission of May 21, 2015 FOIA Request through FOIA Online System (July 13, 2015)
- E. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Denying Expedited Processing (October 6, 2015)
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- M. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 21, 2015)
- N. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 30, 2015)
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## EXHIBIT A

Plaintiffs' FOIA Request  
(May 21, 2015)



State Headquarters  
2966 Woodward Avenue  
Detroit, MI 48201  
Phone 313.578.6800  
Fax 313.578.6811  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

Legislative Office  
115 West Allegan Street  
Lansing, MI 48933  
Phone 517.372.8503  
Fax 517.372.5121  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

West Michigan Regional Office  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
Phone 616.301.0930  
Fax 616.301.0640  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

May 21, 2015

*VIA ELECTRONIC AND CERTIFIED U.S. MAIL:*

FOIA Officer/Public Liaison: Sabrina Burroughs  
U.S Customs and Border Protection  
90 K Street NE, 9th Floor  
Washington, D.C. 20229-1181  
[cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov)

***Re: Freedom of Information Act Request/Expedited Processing Requested***

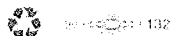
Dear Ms. Burroughs:

This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 522, and related Department of Homeland Security (“DHS”) implementing regulations, *see* 6 C.F.R. § 5 (Department of Homeland Security, Disclosure of Records and Information). The Request is submitted by the American Civil Liberties Union of Michigan, the American Civil Liberties Union Fund of Michigan (hereinafter jointly “ACLU”)<sup>1</sup>, the Michigan Immigrant Rights Center (“MIRC”), Geoffrey Alan Boyce, of the University of Arizona School of Geography and Development, and Elizabeth Oglesby, of the University of Arizona Center for Latin American Studies (collectively “Requesters”).

Requesters seek disclosure of documents related to the enforcement activities of the U.S. Border Patrol and/or its officers and/or staff for Fiscal Years 2012 through 2014. Documents are requested for the Detroit Sector. As noted below, for comparison purposes, some documents are also requested for the Buffalo and Tucson Sectors.

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<sup>1</sup> The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization dedicated to protecting civil liberties and human rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states, and over 500,000 members. The American Civil Liberties Union Fund of Michigan and the American Civil Liberties Union of Michigan are the state affiliate organizations. The two organizations are separate, but integrated. The ACLU Fund of Michigan is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues. The ACLU of Michigan is a 26 U.S.C. § 501(c)(4) organization that provides analyses of pending and proposed legislation, engages in legislative advocacy, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. For the purposes of this request, the term “ACLU” is used to mean the ACLU Fund of Michigan and the ACLU of Michigan.



## BACKGROUND

Since 2006, the U.S. Border Patrol (“USBP”) has nearly doubled in size, from approximately 12,000 agents to over 21,000 today. The budget for U.S. Customs and Border Protection (“CBP”) has more than doubled from \$6 billion in Fiscal Year 2006 to \$12.7 billion in FY 2015.<sup>2</sup> In the Border Patrol’s Detroit Sector, specifically, the agency has grown from 80 agents in FY 2003 to 406 agents in FY 2014 – a 507% increase, the fastest rate of growth of any sector in the United States during this same period.<sup>3</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies – more than on all other federal law enforcement combined.<sup>4</sup> One result of these unprecedented expansions is an increase in reported Border Patrol abuses in the Great Lakes region,<sup>5</sup> and nationally.<sup>6</sup> The U.S. Border Patrol claims authority to conduct warrantless stops and seizures within a “reasonable distance” of the border.<sup>7</sup> That distance is defined by outdated regulations to be “100 air miles”<sup>8</sup> from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.<sup>9</sup> A map obtained by the ACLU of Michigan from Border Patrol

<sup>2</sup> See DEP’T OF HOMELAND SEC., FY 2015 BUDGET IN BRIEF, 7 (2014), *available at* <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf> (last visited May 12, 2015).

<sup>3</sup> See UNITED STATES BORDER PATROL BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2014), *available at*: [www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014_0.pdf) (last visited May 12, 2015).

<sup>4</sup> See Meissner, Doris, *et al.*, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE, 9 (Jan. 2013), *available at* <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> (last visited May 12, 2015).

<sup>5</sup> See *Muniz-Muniz v. U.S. Border Patrol*, 3:09 CV 1865, 2012 WL 5197250 (N.D. Ohio Oct. 19, 2012); NYCLU, JUSTICE DERAILED, (Nov. 2011), *available at* [http://www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf); FAMILIES FOR FREEDOM, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), *available at* <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf>.

<sup>6</sup> From 2004-2011, as the ranks of agents doubled to more than 21,000, complaints involving CBP received by the DHS Office of Civil Liberties and Civil Rights nearly tripled. See DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, “DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED,” *available at* [www.dhs.gov/department-wide-data-complaints-received](http://www.dhs.gov/department-wide-data-complaints-received) (last visited May 12, 2015). Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported.

<sup>7</sup> 8 U.S.C. § 1357(a)(3).

<sup>8</sup> 8 C.F.R. § 287.1(b). The Justice Department published regulations defining “reasonable distance” as 100 miles in the Federal Register in 1957. See *Field Officers: Powers and Duties*, 22 FED. REG. 236, 9808–09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no other public history as to why the Justice Department chose 100 miles as the “reasonable distance” from the border.

<sup>9</sup> Though immigration checkpoints are mostly confined to the southwest, Border Patrol has operated temporary checkpoints in northern states as well. A recent Freedom of Information

purports to show that the entire state of Michigan is within the 100 mile zone. *See* Exhibit A (Border Patrol map).

Litigation involving Border Patrol's Detroit Sector highlights the importance of public access to documents concerning Border Patrol activities. *Muniz-Muniz v. U.S. Border Patrol*, which is pending in the Northern District of Ohio, alleges unconstitutional racial profiling by agents assigned to the Border Patrol's Sandusky station, part of the Detroit Sector responsible for boundary enforcement activities in northeast Ohio.<sup>10</sup> Specifically, the lawsuit alleges significant over-representation of Hispanic and Mexican individuals in USBP apprehension records, when compared to: a) the general population, b) the immigrant population, and c) the estimated undocumented population in the area patrolled by the Sandusky Station. For example, examining USBP arrest records for the Sandusky Station, Dr. Kara Joyner, a sociology professor at Bowling Green State University hired by the plaintiffs in *Muniz-Muniz*, found that Latinos made up 85 percent of those arrested in 2009, 67 percent of arrests in 2010 and 62 percent of arrests in 2011 – even though Latinos comprise only 3 percent of the overall population of the Sandusky Bay region.<sup>11</sup> The extent to which these kinds of abuses may be endemic to other stations in the Detroit Sector, or to the Sector as a whole, is both unknown and of important public consequence.

Litigation and investigative reports around the country have exposed similar problems elsewhere. For example, in October 2013, the ACLU of Arizona filed a complaint on behalf of five Arizona residents, each of whom was stopped and detained by Border Patrol far from the border.<sup>12</sup> In February 2015 the ACLU of San Diego filed a Freedom of Information Act lawsuit requesting records related to USBP San Diego Sector roving patrol activities, and alleging that many of these activities are unlawful.<sup>13</sup> In September 2013, the ACLU of Washington settled a class action lawsuit challenging roving patrol practices on the Olympic Peninsula on behalf of several victims of racial profiling.<sup>14</sup> Pursuant to that settlement, Border Patrol agreed to re-train

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Act (FOIA) request uncovered design plans for permanent checkpoints on southbound New England highways. *See* ACLU of Vermont, *Surveillance on the Northern Border*, 2013, available at [http://www.acluvt.org/surveillance/northern\\_border\\_report.pdf](http://www.acluvt.org/surveillance/northern_border_report.pdf) (last visited May 12, 2015).

<sup>10</sup> *Muniz-Muniz v. U.S. Border Patrol*, 3:09 CV 1865, 2012 WL 5197250 (N.D. Ohio Oct. 19, 2012).

<sup>11</sup> *See* Encarnacion Pyle, *Alleging Profiling, OSU Students Help Sue Border Patrol* COLUMBUS DISPATCH, Nov. 19, 2014, available at [www.dispatch.com/content/stories/local/2014/11/18/OSU-students-help-sue-Border-Patrol.html](http://www.dispatch.com/content/stories/local/2014/11/18/OSU-students-help-sue-Border-Patrol.html) (last visited May 20, 2015).

<sup>12</sup> Complaint available at [www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf](http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf) (last visited May 12, 2015).

<sup>13</sup> *American Civil Liberties Union of San Diego and Imperial Counties v. United States Department of Homeland Security*, 8:15 CV 00229–JLS–RNB (United States District Court For The Central District Of California, Southern Division – Santa Ana, February 10, 2015).

<sup>14</sup> *See Sanchez v. U.S. Office of Border Patrol*, No. 2:12-cv-00735 (W.D. Wa. filed Apr. 26, 2012); Complaint available at <https://aclu-wa.org/cases/sanchez-v-homeland-security-0> (last visited May 12, 2015); *see also* Manuel Valdes, *ACLU, Immigrant Groups to Keep an Eye on*



agents on their obligations under the Fourth Amendment and to share stop data with the ACLU.<sup>15</sup> In January 2013, following extensive FOIA litigation, Families for Freedom and New York University (NYU) issued a report disclosing a “bonus program” for Border Patrol agents and the widespread practice of arresting lawfully present individuals. (CBP denied the existence of documents responsive to plaintiffs’ FOIA request for more than a year before finally producing them).<sup>16</sup> The report notes:

The documents show that USBP agents act on the assumption that no matter where they operate within the United States, they may arrest any noncitizen—whether a tourist or a long-term legal resident with a driver’s license—whenever that person is not carrying detailed documentation that provides proof of status. But USBP’s records also show that the agents are not genuinely interested in what documents the law might require noncitizens to carry. Instead, USBP’s demand for “papers” is universal, resulting in an enforcement culture that maximizes arrest rates.<sup>17</sup>

A prior report, *Justice Derailed*, issued by the New York Civil Liberties Union and based on the same FOIA request, examined thousands of Border Patrol stops aboard public transportation in upstate New York.<sup>18</sup> The vast majority of those stops did not target recent border-crossers and occurred far from the border, with only 1% resulting in initiation of removal proceedings; many involved clear violations of agency arrest guidelines, including improper reliance on race as a basis for questioning passengers and arrests of lawfully present individuals:

Border Patrol abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within the Department of Homeland Security (DHS). Border Patrol lowered its training and admissions standards to take

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*U.S. Border Patrol After Profiling-case Win*, WASH. POST, Sept. 24, 2013, available at [www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profilingcase-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profilingcase-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852_story.html) (last visited May 12, 2015).

<sup>15</sup> See *Settlement Agreement, Sanchez v. U.S. Border Patrol* No. 2:12-cv-00735 (W.D. Wa. 2012), available at <http://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf> (last visited May 12, 2015).

<sup>16</sup> See FAMILIES FOR FREEDOM, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), available at [familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf](http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf) (last visited May 12, 2015). The report also noted, “Contrary to sworn statements submitted in the federal district court stating that the agency did not maintain an array of arrest statistics, including annual totals for the Rochester Station, the depositions ordered by the Court revealed that arrest statistics are the primary measure employed by local USBP stations and their Sector supervisors in the Buffalo Sector.”

<sup>17</sup> *Id.* at v.

<sup>18</sup> See NYCLU, JUSTICE DERAILED, (Nov. 2011), available at [www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf) (last visited May 12, 2015).

on a large number of new agents,<sup>19</sup> and yet the agency has largely failed to adopt reforms such as those related to agents' use of force, contrary to the express recommendations of national law enforcement experts.<sup>20</sup> Meanwhile, oversight bodies like the DHS Office of Inspector General (OIG) and Office for Civil Rights and Civil Liberties (CRCL) – lacking in both enforcement authority and internal transparency – have not kept pace with Border Patrol's rapid growth.<sup>21</sup> As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding the full extent and impact of wide-ranging Border Patrol operations.

## PURPOSE

The purpose of this request is to provide the public with information regarding Border Patrol's practices and procedures relating to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement. Border enforcement questions go to the heart of the Constitution—and are central to our nation's debates on immigration enforcement and reform—and thus are matters of great public concern. The public has a right to review such practices and procedures in order to ensure that constitutional safeguards are respected and the rights of the most vulnerable are upheld.<sup>22</sup> Your prompt compliance in providing the records herein requested is necessary to vindicate the public's right

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<sup>19</sup> See Rob O'Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, available at [www.azcentral.com/news/arizona/articles/20131216border-agents-assisting-local-police.html](http://www.azcentral.com/news/arizona/articles/20131216border-agents-assisting-local-police.html) (“During its hiring surge, the Border Patrol scaled back training and relaxed requirements — such as not requiring a high-school diploma. It sometimes skipped background checks, leading to problems with corruption and poorly trained agents.”) (last visited May 12, 2015).

<sup>20</sup> See Brian Bennett, *Border Patrol Sees Little Reform on Agents' Use of Force*, Los Angeles Times, February 23, 2015, available at [www.latimes.com/nation/la-na-border-abuse-20150223-story.html#page=1](http://www.latimes.com/nation/la-na-border-abuse-20150223-story.html#page=1) (last visited May 12, 2015).

<sup>21</sup> While CBP's budget increased by 97 percent from FY 2004 to FY 2012, OIG's budget increased by only 70 percent during this same time period, while CRCL's budget increased only 56 percent. Overall, the combined budget of the OIG and CRCL accounted for less than .005 percent of the total DHS budget in FY 2011. See DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2004 ANNUAL PERFORMANCE PLAN 6 (2004), available at [www.oig.dhs.gov/assets/OIG\\_APP\\_FY04.pdf](http://www.oig.dhs.gov/assets/OIG_APP_FY04.pdf) (Last visited May 12, 2015); DEP'T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at [www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf](http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf) (last visited May 12, 2015); DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011 AND ANNUAL REPORT TO CONGRESS, 6 (June 2012), available at [www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf](http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf) (last visited May 12, 2015).

<sup>22</sup> The public's right to these records is clear. In another recent case, a federal district court repeatedly ordered a local New York CBP office to search for and produce similar documents regarding the office's procedures and practices. *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 382 (S.D.N.Y. 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 10 Civ. 2705 SAS, 2011 WL 4599592 (S.D.N.Y. Sept. 30, 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287 (S.D.N.Y. 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 331 (S.D.N.Y. 2011).

to be part of an “informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the governors accountable to the governed.”<sup>23</sup>

## RECORDS REQUESTED

As used herein, the term “records” should be understood broadly, and includes all records or communications preserved in electronic or written form, including but not limited to: correspondence, emails, documents, data, statistics, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, policies, procedures, memoranda, agreements, instructions, training materials, notes (including handwritten), orders, legal opinions, protocols, reports, manuals, technical specifications, studies, or any other record of any kind.

Should any responsive record contain the personal identifying information of any individual stopped or detained by the U.S. Border Patrol, or any other DHS entity, Requesters ask that the agencies redact that information. This Request seeks aggregate stop data and records relevant to USBP operations, *not* any personal or identifying information about any specific individual(s), such as individual names or A-numbers.

**Unless otherwise noted, all requests are for the Fiscal Years 2012 through 2014. In addition, all requests are for records for the Detroit Sector, except that, where noted under section A.1., records from the Buffalo and Tucson sectors are also requested.**

Specifically, Requesters seek:

### **A. Documents Related to Daily Apprehension Logs:**

1. **Daily Apprehension Logs for the Detroit, Buffalo and Tucson Sectors.** This includes, but is not limited to all data and statistics relating to:
  - a. Sex
  - b. Adult/Juvenile Age
  - c. Status at Entry
  - d. Entry Landmark
  - e. Arrest Landmark
  - f. Arrest Method (e.g., Other Agency, Patrol Border)
  - g. Deportable
  - h. Status When Found
  - i. Time in U.S.

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<sup>23</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1979).

- j. Port of Entry
- k. Disposition
- l. Nationality/ Country of Citizenship;
- m. Remarks – Principal/Smuggled
- n. Apprehending Officer Name(s)
- o. Apprehending Officer’s Assigned Station
- p. Complexion
- q. Criminal Record
- r. Event Number

**B. Documents Showing Individual Stops and Detentions**

1. Copies of all Form I-213s (“Record of Deportable/Inadmissible Alien”) for the Detroit Sector:
  - a. For each individual detained or taken into custody; and
  - b. For each individual transferred to USBP by state or local law enforcement officials.
2. Copies of all Form I-44s (“Report of Apprehension or Seizure”) for the Detroit Sector:
  - a. For each individual transferred to USBP by state or local law enforcement officials; and
  - b. For each individual stopped but not arrested by USBP for whom I-44’s were issued.
3. For the Detroit Sector, all records that provide possible codes and/or words and/or phrases (hereinafter “code(s)”), along with explanations of those codes, that could be filled in by USBP on the Daily Apprehension Logs, I-213 forms and I-44 forms, including any records related to the meaning of codes:
  - a. Under “Method of Location/Apprehension”;
  - b. Under “Status when Found”;
  - c. Under “Criminal Record”; and

- d. Under “Cmplxn,” and any records that instruct, guide, or train officers about how to determine how to classify arrestees by their complexion.

**C. Documents Related to Interior Enforcement**

1. For the Detroit Sector, all records setting forth policies and procedures related to the planning and/or implementation of USBP interior enforcement actions, including raids, patrols, and other contact with members of the public for the purpose of enforcing immigration law. This includes:
  - a. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding the circumstances under which CBP agents may participate in task forces with local law enforcement or provide operational backup to state or local law enforcement, or under which CBP agents may enforce state law.
  - b. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding USBP agents’ use of race or ethnicity as a factor in law enforcement decisions.
  - c. All records describing, defining or delimiting USBP’s patrol areas, including but not limited to maps of patrols or patrol areas and maps of apprehensions.
  - d. All records containing guidance, including but not limited to that from other federal agencies or components of the Department of Homeland Security, regarding enforcement activities related to specific nationalities, ethnicities, faith communities or groups. This includes any guidance regarding what conditions or activities constitute suspicious activity authorizing or requiring scrutiny or contact by USBP personnel.
  - e. All records regarding when and under what circumstances it is appropriate for USBP to engage in particular methods of law enforcement, including but not limited to pedestrian stops, vehicle stops, stops based on reasonable suspicion or consent, searches authorized by court-issued warrants or based on consent.
2. All records, including emails, relating to policies and procedures for collaboration between USBP and state or local law enforcement agencies in the Detroit Sector on the following issues:
  - a. Operational backup or support provided by USBP personnel to state or local law enforcement agencies;
  - b. Multi-jurisdictional task force activities that include USBP personnel;
  - c. The investigation of the immigration status of crime victims or witnesses;

- d. Racial or ethnic profiling and/or racial or ethnic profiling concerns.
3. For the Detroit Sector, all records that contain any information regarding arrest quotas, targets, goals and expectations that USBP or its personnel were required to meet from fiscal year 2008 to the present.
4. Performance review standards for USBP and its personnel from fiscal year 2008 to the present.

**D. Documents Related to Complaints**

1. Any records within the possession of the CBP concerning complaints received and/or investigated by DHS, any DHS subcomponents, including CBP internal affairs, the Office for Civil Rights and Civil Liberties (CRCL), Office of Inspector General (OIG); Office of Professional Responsibility (OPR) and internal affairs against CBP or its agents or employees in the Detroit Sector, including but not limited to:
  - a. Complaints alleging misconduct with respect to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement;
  - b. Complaints received through any complaint line or email box or through referral from CBP, CRCL, OIG, OPR or any other agency within DHS;
  - c. All disciplinary actions taken in response to any such complaints.

We request that responsive electronic records be provided electronically in their native file format, if possible. 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agencies' possession, and that the records be provided in separate, Bates-stamped files. We further request that reasonable metadata be transmitted along with responsive documents, including but not limited to email attachments, author and recipient information, date and time stamps, and the like.

**REQUEST FOR EXPEDITED PROCESSING**

Requester seeks Track 1 expedited processing for this FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(E)(i) ("Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—(I) in cases in which the person requesting the records demonstrates a compelling need . . .").

A "compelling need" exists when "a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." 5 U.S.C. § 552(a)(6)(E)(v)(1); *see also* 6 C.F.R. § 5.5(d)(1)(i). Without expedited disclosure of the requested records, individuals in USBP custody may face

continuing, imminent threats to their life or physical safety. This is particularly true given the volume and persistent nature of the alleged abuses outlined above. There is thus a “compelling need” for the requested records.

A “compelling need” can also be demonstrated “with respect to a request made by a person primarily engaged in disseminating information,” by an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Here, the ACLU and MIRC are “person[s] primarily engaged in disseminating information,” and there is an urgent need to inform the public regarding Border Patrol activities.

With respect to the ACLU, dissemination of information to the public about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU seeks to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has a particular commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status, and that government respects the civil and human rights of all people. Educating the public is a central to this work. Specifically, the ACLU publishes a blog, newsletters, reports, fact sheets, news briefings, “Know Your Rights” documents, and other educational and informational materials that are designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These ACLU publications often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.”).

The website of the ACLU of Michigan ([www.aclumich.org](http://www.aclumich.org)) addresses civil rights and civil liberties issues in depth, provides information on civil rights and civil liberties issues in the news, and contains a large volume of documents relating to the issues on which the ACLU is focused, including immigration. The websites of the National ACLU and other state ACLU affiliates similarly feature information obtained through the FOIA process.<sup>24</sup> The ACLU further disseminates information to the public via social media platforms such as Facebook and Twitter.

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<sup>24</sup> See, e.g., THE TORTURE DATABASE, <http://www.thetorturedatabase.org> (last visited May 12, 2015); MAPPING THE FBI, <http://www.aclu.org/mappingthefbi> (last visited Mar. 16, 2015); see also, e.g., Press Release, ACLU of San Diego & Imperial Counties, CBP Releases Report, New Training Handbook (May 22, 2014), <http://www.aclusandiego.org/radio-silence-border-patrol-use-force-policies-leads-lawsuit/> (last visited May 12, 2015).

ACLU materials are specifically designed to be educational and are widely disseminated to the public.<sup>25</sup> These materials are widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through the ACLU's public education department and websites. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Similarly, MIRC, which is a legal resource center for Michigan's immigrant communities, is heavily engaged in disseminating information. MIRC disseminates information about topics affecting immigrants and refugees via a variety of media including its website, social media, and an email newsletter service. The MIRC website ([michiganimmigrant.org](http://michiganimmigrant.org)) provides extensive information on immigration-related issues. The website includes a library of materials used by community advocates. It includes a database of documents previously obtained through FOIA from Immigration and Customs Enforcement.<sup>26</sup> In the past two years, the website has received 78,147 page views from 18,162 unique users seeking information. Last year, MIRC made presentations about immigration law and immigrant rights to more than 3,800 individuals and responded to 483 requests for technical support from attorneys and advocates.

Depending on the results of this Request, the ACLU and MIRC plan to disseminate the information they receive among the public through these kinds of publications in these kinds of channels. The ACLU and MIRC are therefore organizations "primarily engaged in disseminating information" within the meaning of the statute and the relevant regulations. Indeed, the fact that that ACLU meets these criteria has previously been recognized in FOIA litigation between the ACLU and the Department of Justice. *See, e.g., American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information" (internal citation omitted)).

Moreover, this Request concerns actual or alleged federal government activity that is a matter of current exigency. As discussed above, allegations against CBP of abuse, neglect, excessive force and racial profiling have persisted for years, attracting considerable, sustained media coverage and public attention.<sup>27</sup> Furthermore, the nation is engaged in an ongoing, time-

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<sup>25</sup> *See, e.g.,* Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (Mar. 28, 2014, 12:29 PM), <http://slate.me/1jg5YXx> (describing national ACLU's efforts to broadly disseminate important civil rights-related news stories) (last visited May 12, 2015).

<sup>26</sup> "ICE Training Documents", *available at* [www.michiganimmigrant.org/resources/library](http://www.michiganimmigrant.org/resources/library) (last visited May 12, 2015).

<sup>27</sup> *See, e.g., Editorial: Put Limits on Border Patrol*, BOSTON GLOBE, Jan. 1, 2015, *available at* <http://bit.ly/1r15K2t> (last visited May 12, 2015); Ed Pilkington, *Freezing Cells and Sleep Deprivation: The Brutal Conditions Migrants Still Face After Capture*, GUARDIAN, Dec. 12, 2014, *available at* <http://bit.ly/1uxlzVi> (last visited May 12, 2015); Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO, Nov./Dec. 2014, *available at* <http://politi.co/1t1B4CS> (last



sensitive debate about immigration reform, and the extent to which the activities of Border Patrol should be expanded. Current, comprehensive information about USBP's activities is urgently needed in order to ensure that this debate is based on an accurate understanding of those activities. Yet CBP has consistently failed to turn over information that ought to be made available to the public, and that is necessary to inform public debate.<sup>28</sup> Any discussion of modifying Border Patrol's role as part of immigration reform must be premised on an understanding of Border Patrol's current practices. Given the fast-moving immigration debate, there is an urgent need for the documents requested here.

For all of the foregoing reasons, expedited processing of this Request is warranted and should be granted. Requesters hereby certify that the foregoing is true and correct to the best of their knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3).

### REQUEST FOR A WAIVER OR LIMITATION OF SEARCH AND REVIEW FEES

The Requesters seek a full waiver of all fees because disclosure of the requested records is in the public interest." See 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.").

At a minimum, should a total fee waiver be denied, Requesters seek a waiver of all processing (search and review) fees because the ACLU and MIRC qualify as "representatives of the news media," because Mr. Boyce and Dr. Oglesby qualify as researchers at an educational institution, and because the records are not sought for commercial use. See 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees should be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution; or a representative of the news media"); 6

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visited May 12, 2015); Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion In Agency*, NPR, Aug. 28, 2014, available at <http://n.pr/1p9YST8> (last visited May 12, 2015); Andrew Becker, *Border Agency's Former Watchdog Says Officials Impeded His Efforts*, WASH. POST, Aug. 16, 2014, available at <http://wapo.st/1rNoBnz> (last visited May 12, 2015); Andrew Becker, *Removal of Border Agency's Internal Affairs Chief Raises Alarms*, CTR. FOR INVESTIGATIVE REPORTING, June 12, 2014, available at <http://bit.ly/1v6mRbM> (last visited May 12, 2015); Karen McVeigh, *Immigration Groups Allege Abuse of Migrant Minors by US Border Patrol*, GUARDIAN, June 11, 2014, available at <http://bit.ly/1tqi70g> (last visited May 12, 2015); Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. TIMES, May 5, 2014, available at <http://nyti.ms/1BgT7fr> (last visited May 12, 2015).

<sup>28</sup> See *Ohio State University Moritz College of Law Civil Clinic et al. v. U.S. Customs and Border Protection*, No. 14-2329 (S.D. Ohio Nov. 18, 2014); *Arizona Civil Liberties Union Foundation of Arizona, Derek E. Bambauer and Jane Yakowitz Bambauer v. U.S. Department of Homeland Security* No. 15-00247 (D.AZ. Feb. 11, 2015); *American Civil Liberties Union of San Diego and Imperial Counties v. United States Department of Homeland Security*, 8:15 CV 00229-JLS-RNB (C.D. Cal., filed Feb. 20, 2015); *Brown, et al. v. USCBP and USDHS*, 15-cv-01181-JD (N.D. Cal. Mar. 12, 2015).

C.F.R. § 5.11(d)(1) (search fees shall not be charged “for requests by educational institutions . . . or representatives of the news media”); *id.* § 5.11(k)(1) (“Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that (i) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.”). As discussed below, federal agencies routinely grant such fee waivers for FOIA requests made by the ACLU and similar organizations for these reasons.

**A. Release of the requested records is in the public interest.**

The records requested will contribute significantly to public understanding of the government’s operations or activities. Under 6 C.F.R. § 5.11(k)(2), the following factors are to be considered in determining whether a disclosure is in the public interest: (i) whether the subject of the requested records concerns “the operations or activities of the government”; (ii) whether the disclosure is “likely to contribute” to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to “public understanding,” that is, “the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *See* 6 C.F.R. § 5.11(k)(2)(i)–(iv). Each of these considerations is satisfied here.

First, the records requested pertain directly to the operations and activities of the federal government (specifically, CBP and one of its subcomponents, the U.S. Border Patrol).

Second, this Request is “likely to contribute” to an understanding of government operations or activities, specifically by helping the public understand Border Patrol’s immigration enforcement policies and practices, including racial profiling and its’ efforts to work with local law enforcement. Given the current debate on comprehensive immigration reform, and ongoing debates over local and state law enforcement’s cooperation with federal immigration enforcement, few issues are more important to the public. Border Patrol’s practices and procedures regarding racial profiling have received national attention, addressed both by Congress during the drafting of comprehensive immigration reform and by the media due to the advocacy of immigrant rights groups and various lawsuits filed against Border Patrol.<sup>29</sup>

Third, disclosure of the requested information will contribute to “the understanding of a reasonably broad audience of persons interested in the subject” of how individuals detained by USBP are treated while in USBP custody. Among other things, Mr. Boyce and Dr. Oglesby intend to conduct detailed scholarly analysis of the data obtained, in order to assess such factors as the proximity to the border of Border Patrol arrests and what proportion of arrestees are recent

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<sup>29</sup> *See, e.g.,* Brian Bennett, *Immigration rights groups accuse officials of racial profiling*, L.A. TIMES, Mar 13, 2013; Manuel Valdes, *ACLU Sues Border Patrol Over Alleged Racial Profiling in Pacific Northwest Border*, HUFF. POST, Apr. 27, 2012; Rebekah L. Cowell, *Raleigh church members sue feds, allege racial profiling*, INDY WEEK, Mar. 2, 2011.

border crossers. Moreover, the ACLU and MIRC intend to publish responsive records and develop reports or analyses regarding USBP's enforcement practices.

Finally, disclosure will contribute "significantly" to the public's understanding of U.S. Border Patrol detention policies and practices. As noted, issues surrounding CBP arrest and detention policies and practices have garnered significant and sustained public and media attention, yet much remains unknown about this critical civil and human rights issue.

The Requesters have thus established, "with reasonable specificity[,] that [their] request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government." *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

#### **B. The ACLU and MIRC qualify as representatives of the news media.**

At a minimum, should a total fee waiver be denied, "fees should be limited to reasonable standard charges for document duplication" because the ACLU and MIRC are "representative[s] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The ACLU and MIRC both meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. 522(a)(4)(A)(ii); 6 C.F.R. § 5.11 (b)(6); *see also Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that "gathers information from a variety of sources," exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA). The ACLU and MIRC are "representatives of the news media" for the same reasons that they are "primarily engaged in the dissemination of information." *See Electronic Privacy Information Center*, 241 F. Supp. 2d at 10-15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for FOIA purposes); *ACLU v. Department of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information").<sup>30</sup> Courts have found other organizations whose mission, function,

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<sup>30</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2012, the Bureau of Prisons granted a fee waiver to the ACLU for a FOIA request seeking documents concerning isolated confinement of prisoners in BOP custody. In March 2012, the Department of Justice Criminal Division granted a fee waiver to the ACLU for a FOIA request seeking records about the government's access to the contents of individuals' private electronic communications. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the

publishing, and public education activities are similar in kind to the Requesters to be “representatives of the news media.” See, e.g., *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester). Indeed various federal courts have specifically held that the ACLU is a “representative of the news media.” See, e.g., *Service Women’s Action Network v. Department of Defense*, 888 F. Supp. 2d 282, 287–88 (D. Conn. 2012) (holding that that the national ACLU and ACLU of Connecticut are “representatives of the news media”); *American Civil Liberties Union of Washington v. Department of Justice*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

### C. Mr. Boyce and Dr. Oglesby Qualify as Researchers at an Educational Institution

Geoffrey Alan Boyce is a doctoral candidate in the School of Geography and Development, at the University of Arizona, which is an educational institution. From 2011-2013 he was a National Science Foundation Graduate Research Fellow. He has conducted research supported by the National Science Foundation, the Tinker Foundation, the ConfluenCenter for Creative Inquiry, and the University of Arizona Social and Behavioral Sciences Research Institute. His research work has covered a number of topics, including international relations, transnational migration and U.S. immigration policy. He has had peer-reviewed work published (or accepted for publication) in scholarly journals including: *Geopolitics; Area; Territory, Politics and Governance*; the *Arizona Journal for Interdisciplinary Studies*; as well as the University of Georgia Press. Mr. Boyce has professional training in qualitative and mixed-methods research; statistical data analysis; and Geographic Information Systems (GIS).

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PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Dr. Elizabeth Oglesby is an Associate Professor in the School of Geography and Development and the Center for Latin American Studies at the University of Arizona. Dr. Oglesby's research focuses on issues related to immigration, globalization and labor, human rights, and Central America. Dr. Oglesby has published peer-reviewed work in a number of scholarly venues including *Environment and Planning D; Space and Polity; Geoforum*; and Duke University Press. Dr. Oglesby has also served as editor of the *Central America Report*, a weekly bulletin of economic and political news analysis published by Inforpress Centroamericana in Guatemala City; an associate editor for the *NACLA Report on the Americas*, the largest circulating English-language publication of Latin American affairs; and a correspondent for *Latinamerica Press*, a hemispheric news service based in Lima, Peru.

Beginning in the late 1990s Dr. Oglesby served as a consultant to the Guatemalan Commission for Historical Clarification (Truth Commission) of the United Nations Office of Project Services in Guatemala City, serving as the assistant to the coordinator of the final report, the coordinator of historical and regional context materials, and a member of the writing team of the final report. In 2013, Dr. Oglesby served as an expert witness in the trial of former Guatemalan President Efraín Ríos Montt, who was charged with genocide and crimes against humanity for presiding over the deaths of 1,700 Maya in 1982-83. Dr. Oglesby's present research examines the transnational affects of immigration enforcement activity on host and sending communities in Guatemala, Mexico and the United States.

Mr. Boyce and Dr. Oglesby intend to analyze the documents obtained through this FOIA request, and subject the information these contain to spatial and statistical analysis, to examine enforcement patterns; how these may or may not unevenly concentrate on specific regions and populations; and whether or not USBP enforcement activities in the Detroit Sector differ meaningfully from patterns observed in other USBP enforcement sectors. Mr. Boyce and Dr. Oglesby will publish scholarly work based on the analysis conducted on the documents obtained through this FOIA request. This analysis will be relevant to scholars in a number of academic fields who study patterns and practices of immigration and law enforcement in the United States. These fields include geography, anthropology, sociology, criminology, area studies and migration studies.

Both Mr. Boyce and Dr. Oglesby qualify as researchers at an educational institution under the Freedom of Information Act and its implementing regulations. *See* 28 C.F.R. § 16.11(b)(4). Thus, they should not be charged search or review fees for this Request. *Id.*

**D. Disclosure of the information requested is not in the commercial interest of the Requesters.**

Disclosure of the information requested is not in the commercial interest of the ACLU, MIRC, Mr. Boyce or Dr. Oglesby.

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For the foregoing reasons, a fee waiver or limitation should be granted. A fee waiver would also fulfill Congress's legislative intent in amending FOIA, namely to ensure that the Act

is liberally construed in favor of granting waivers for noncommercial requesters and to effectuate disclosure of documents of public importance. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (internal quotation marks and citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that “disclosure, not secrecy, is the dominant objective of the Act,” quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1991)).

Should a total waiver be denied, fees should be “limited to reasonable standard charges for document duplication,” as the Requesters are non-profit institutions and educational researchers seeking such records not for a commercial purpose, but rather to disclose such records through the news media, and put them to use for research purposes. 5 U.S.C. § 552(a)(4)(A)(ii)(II). While it is permissible to charge document duplication fees to educational institutions and representatives of the news media, Requesters are seeking documents in an electronic format. Hence there should be no, or at most, negligible document duplication costs.

If a fee waiver is denied, the Requesters are prepared to pay fees up to \$100.00. We ask that you inform us first if fees in excess of \$100.00 may be charged, though we reserve the right to appeal a denial of fee waivers.

The Requesters certify that the above information is true and correct to the best of the requesters’ knowledge. 6 C.F.R. § 5.5(d)(3).

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Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4). We further expect your reply to the Request itself within twenty (20) days, as required under 5 U.S.C. § 552(a)(6)(A)(i). If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material. In addition, we request that you provide an estimated date on which you will complete the processing of this request. 5 U.S.C. § 552(a)(7)(B). We reserve the right to appeal a decision to withhold any information.

Please furnish the requested records electronically to all of the following:

Geoffrey Boyce  
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Fax: 520-621-2889  
[gboyce@email.arizona.edu](mailto:gboyce@email.arizona.edu)  
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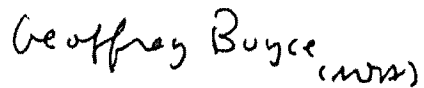
Miriam Aukerman  
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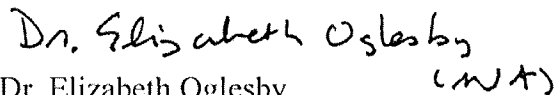
Should you need to communicate with us regarding this Request, please contact us by email or phone at the addresses listed above.

Thank you in advance for your prompt assistance.

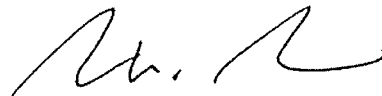
Sincerely,

 (MST)

Geoffrey Boyce  
School of Geography and Development  
The University of Arizona

 (MST)

Dr. Elizabeth Oglesby  
School of Geography and Development  
The University of Arizona



Miriam Aukerman  
ACLU of Michigan

 (MST)

Susan Reed  
Michigan Immigrant Rights Center

# **EXHIBIT A**

**100 Air Mile Zone**





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- D. FOIA Online System Receipt for Resubmission of May 21, 2015 FOIA Request through FOIA Online System (July 13, 2015)
- E. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Denying Expedited Processing (October 6, 2015)
- F. Aukerman Letter Appealing Denial of Expedited Processing (October 14, 2015)
- G. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Regarding Fee Waiver (October 21, 2015)
- H. Aukerman Letter Appealing Failure to Make Timely Determination on FOIA Request and Reiterating Appeal of Denial of Expedited Processing (November 19, 2015)
- I. Howard Letter Re Initial Response to FOIA Request (January 12, 2016)
- J. Administrative Appeal Letter by Damren (February 29, 2016)
- K. Administrative Closure (May 9, 2016)
- L. Suzuki Letter Re Appeal of Expedited Processing and FOIA Online System (September 30, 2016)
- M. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 21, 2015)
- N. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 30, 2015)
- O. Aukerman Email Seeking Clarification on Case Numbers (October 26, 2016)
- P. Plaintiffs' Letter Re Problems with FOIA Online System (February 26, 2016)

## EXHIBIT B

Cover E-mail for Submission of FOIA Request  
(May 21, 2015)

**Miriam Aukerman**

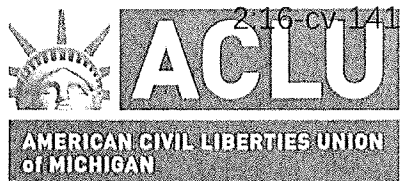
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**From:** Miriam Aukerman  
**Sent:** Thursday, May 21, 2015 4:47 PM  
**To:** 'cbpfoia@dhs.gov'  
**Cc:** Susan Reed (susanree@michiganimmigrant.org); Anna Hill (ahill@michiganimmigrant.org); 'Geoff Boyce'; Oglesby, Elizabeth A - (eoglesby@email.arizona.edu)  
**Subject:** FOIA Request for CBP Records  
**Attachments:** CBP FOIA Final 15.5.21.pdf

Dear FOIA Officer,

Attached please find a FOIA request regarding CBP records. Please do not hesitate to contact me should you have any questions. Thank you for your prompt assistance.

Miriam Aukerman  
Staff Attorney  
West Michigan Regional Office  
American Civil Liberties Union of Michigan  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
616-301-0930



East Lansing  
2966 Woodward Avenue  
Detroit, MI 48201  
Phone 313.578.6800  
Fax 313.578.6811  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

Lansing Office  
115 West Allegan Street  
Lansing, MI 48933  
Phone 517.372.8503  
Fax 517.372.5121  
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Fax 616.301.0640  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

May 21, 2015

*VIA ELECTRONIC AND CERTIFIED U.S. MAIL:*

FOIA Officer/Public Liaison: Sabrina Burroughs  
U.S Customs and Border Protection  
90 K Street NE, 9th Floor  
Washington, D.C. 20229-1181  
[cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov)

***Re: Freedom of Information Act Request/Expedited Processing Requested***

Dear Ms. Burroughs:

This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 522, and related Department of Homeland Security (“DHS”) implementing regulations, *see* 6 C.F.R. § 5 (Department of Homeland Security, Disclosure of Records and Information). The Request is submitted by the American Civil Liberties Union of Michigan, the American Civil Liberties Union Fund of Michigan (hereinafter jointly “ACLU”)<sup>1</sup>, the Michigan Immigrant Rights Center (“MIRC”), Geoffrey Alan Boyce, of the University of Arizona School of Geography and Development, and Elizabeth Oglesby, of the University of Arizona Center for Latin American Studies (collectively “Requesters”).

Requesters seek disclosure of documents related to the enforcement activities of the U.S. Border Patrol and/or its officers and/or staff for Fiscal Years 2012 through 2014. Documents are requested for the Detroit Sector. As noted below, for comparison purposes, some documents are also requested for the Buffalo and Tucson Sectors.

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<sup>1</sup> The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization dedicated to protecting civil liberties and human rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states, and over 500,000 members. The American Civil Liberties Union Fund of Michigan and the American Civil Liberties Union of Michigan are the state affiliate organizations. The two organizations are separate, but integrated. The ACLU Fund of Michigan is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues. The ACLU of Michigan is a 26 U.S.C. § 501(c)(4) organization that provides analyses of pending and proposed legislation, engages in legislative advocacy, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. For the purposes of this request, the term “ACLU” is used to mean the ACLU Fund of Michigan and the ACLU of Michigan.

## BACKGROUND

Since 2006, the U.S. Border Patrol (“USBP”) has nearly doubled in size, from approximately 12,000 agents to over 21,000 today. The budget for U.S. Customs and Border Protection (“CBP”) has more than doubled from \$6 billion in Fiscal Year 2006 to \$12.7 billion in FY 2015.<sup>2</sup> In the Border Patrol’s Detroit Sector, specifically, the agency has grown from 80 agents in FY 2003 to 406 agents in FY 2014 – a 507% increase, the fastest rate of growth of any sector in the United States during this same period.<sup>3</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies – more than on all other federal law enforcement combined.<sup>4</sup> One result of these unprecedented expansions is an increase in reported Border Patrol abuses in the Great Lakes region,<sup>5</sup> and nationally.<sup>6</sup> The U.S. Border Patrol claims authority to conduct warrantless stops and seizures within a “reasonable distance” of the border.<sup>7</sup> That distance is defined by outdated regulations to be “100 air miles”<sup>8</sup> from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.<sup>9</sup> A map obtained by the ACLU of Michigan from Border Patrol

<sup>2</sup> See DEP’T OF HOMELAND SEC., FY 2015 BUDGET IN BRIEF, 7 (2014), *available at* <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf> (last visited May 12, 2015).

<sup>3</sup> See UNITED STATES BORDER PATROL BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2014), *available at*: [www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014_0.pdf) (last visited May 12, 2015).

<sup>4</sup> See Meissner, Doris, *et al.*, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE, 9 (Jan. 2013), *available at* <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> (last visited May 12, 2015).

<sup>5</sup> See *Muniz-Muniz v. U.S. Border Patrol*, 3:09 CV 1865, 2012 WL 5197250 (N.D. Ohio Oct. 19, 2012); NYCLU, JUSTICE DERAILED, (Nov. 2011), *available at* [http://www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf); FAMILIES FOR FREEDOM, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), *available at* <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf>.

<sup>6</sup> From 2004-2011, as the ranks of agents doubled to more than 21,000, complaints involving CBP received by the DHS Office of Civil Liberties and Civil Rights nearly tripled. See DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, “DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED,” *available at* [www.dhs.gov/department-wide-data-complaints-received](http://www.dhs.gov/department-wide-data-complaints-received) (last visited May 12, 2015). Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported.

<sup>7</sup> 8 U.S.C. § 1357(a)(3).

<sup>8</sup> 8 C.F.R. § 287.1(b). The Justice Department published regulations defining “reasonable distance” as 100 miles in the Federal Register in 1957. See *Field Officers: Powers and Duties*, 22 FED. REG. 236, 9808–09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no other public history as to why the Justice Department chose 100 miles as the “reasonable distance” from the border.

<sup>9</sup> Though immigration checkpoints are mostly confined to the southwest, Border Patrol has operated temporary checkpoints in northern states as well. A recent Freedom of Information

purports to show that the entire state of Michigan is within the 100 mile zone. *See* Exhibit A (Border Patrol map).

Litigation involving Border Patrol's Detroit Sector highlights the importance of public access to documents concerning Border Patrol activities. *Muniz-Muniz v. U.S. Border Patrol*, which is pending in the Northern District of Ohio, alleges unconstitutional racial profiling by agents assigned to the Border Patrol's Sandusky station, part of the Detroit Sector responsible for boundary enforcement activities in northeast Ohio.<sup>10</sup> Specifically, the lawsuit alleges significant over-representation of Hispanic and Mexican individuals in USBP apprehension records, when compared to: a) the general population, b) the immigrant population, and c) the estimated undocumented population in the area patrolled by the Sandusky Station. For example, examining USBP arrest records for the Sandusky Station, Dr. Kara Joyner, a sociology professor at Bowling Green State University hired by the plaintiffs in *Muniz-Muniz*, found that Latinos made up 85 percent of those arrested in 2009, 67 percent of arrests in 2010 and 62 percent of arrests in 2011 – even though Latinos comprise only 3 percent of the overall population of the Sandusky Bay region.<sup>11</sup> The extent to which these kinds of abuses may be endemic to other stations in the Detroit Sector, or to the Sector as a whole, is both unknown and of important public consequence.

Litigation and investigative reports around the country have exposed similar problems elsewhere. For example, in October 2013, the ACLU of Arizona filed a complaint on behalf of five Arizona residents, each of whom was stopped and detained by Border Patrol far from the border.<sup>12</sup> In February 2015 the ACLU of San Diego filed a Freedom of Information Act lawsuit requesting records related to USBP San Diego Sector roving patrol activities, and alleging that many of these activities are unlawful.<sup>13</sup> In September 2013, the ACLU of Washington settled a class action lawsuit challenging roving patrol practices on the Olympic Peninsula on behalf of several victims of racial profiling.<sup>14</sup> Pursuant to that settlement, Border Patrol agreed to re-train

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Act (FOIA) request uncovered design plans for permanent checkpoints on southbound New England highways. *See* ACLU of Vermont, *Surveillance on the Northern Border*, 2013, available at [http://www.acluvt.org/surveillance/northern\\_border\\_report.pdf](http://www.acluvt.org/surveillance/northern_border_report.pdf) (last visited May 12, 2015).

<sup>10</sup> *Muniz-Muniz v. U.S. Border Patrol*, 3:09 CV 1865, 2012 WL 5197250 (N.D. Ohio Oct. 19, 2012).

<sup>11</sup> *See* Encarnacion Pyle, *Alleging Profiling, OSU Students Help Sue Border Patrol* COLUMBUS DISPATCH, Nov. 19, 2014, available at [www.dispatch.com/content/stories/local/2014/11/18/OSU-students-help-sue-Border-Patrol.html](http://www.dispatch.com/content/stories/local/2014/11/18/OSU-students-help-sue-Border-Patrol.html) (last visited May 20, 2015).

<sup>12</sup> Complaint available at [www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%2009%202013.pdf](http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%2009%202013.pdf) (last visited May 12, 2015).

<sup>13</sup> *American Civil Liberties Union of San Diego and Imperial Counties v. United States Department of Homeland Security*, 8:15 CV 00229–JLS–RNB (United States District Court For The Central District Of California, Southern Division – Santa Ana, February 10, 2015).

<sup>14</sup> *See Sanchez v. U.S. Office of Border Patrol*, No. 2:12-cv-00735 (W.D. Wa. filed Apr. 26, 2012); Complaint available at <https://aclu-wa.org/cases/sanchez-v-homeland-security-0> (last visited May 12, 2015); *see also* Manuel Valdes, *ACLU, Immigrant Groups to Keep an Eye on*

agents on their obligations under the Fourth Amendment and to share stop data with the ACLU.<sup>15</sup> In January 2013, following extensive FOIA litigation, Families for Freedom and New York University (NYU) issued a report disclosing a “bonus program” for Border Patrol agents and the widespread practice of arresting lawfully present individuals. (CBP denied the existence of documents responsive to plaintiffs’ FOIA request for more than a year before finally producing them).<sup>16</sup> The report notes:

The documents show that USBP agents act on the assumption that no matter where they operate within the United States, they may arrest any noncitizen—whether a tourist or a long-term legal resident with a driver’s license—whenever that person is not carrying detailed documentation that provides proof of status. But USBP’s records also show that the agents are not genuinely interested in what documents the law might require noncitizens to carry. Instead, USBP’s demand for “papers” is universal, resulting in an enforcement culture that maximizes arrest rates.<sup>17</sup>

A prior report, *Justice Derailed*, issued by the New York Civil Liberties Union and based on the same FOIA request, examined thousands of Border Patrol stops aboard public transportation in upstate New York.<sup>18</sup> The vast majority of those stops did not target recent border-crossers and occurred far from the border, with only 1% resulting in initiation of removal proceedings; many involved clear violations of agency arrest guidelines, including improper reliance on race as a basis for questioning passengers and arrests of lawfully present individuals.

Border Patrol abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within the Department of Homeland Security (DHS). Border Patrol lowered its training and admissions standards to take

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*U.S. Border Patrol After Profiling-case Win*, WASH. POST, Sept. 24, 2013, available at [www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profilingcase-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profilingcase-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852_story.html) (last visited May 12, 2015).

<sup>15</sup> See *Settlement Agreement, Sanchez v. U.S. Border Patrol* No. 2:12-cv-00735 (W.D. Wa. 2012), available at <http://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf> (last visited May 12, 2015).

<sup>16</sup> See FAMILIES FOR FREEDOM, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), available at [familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf](http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf) (last visited May 12, 2015). The report also noted, “Contrary to sworn statements submitted in the federal district court stating that the agency did not maintain an array of arrest statistics, including annual totals for the Rochester Station, the depositions ordered by the Court revealed that arrest statistics are the primary measure employed by local USBP stations and their Sector supervisors in the Buffalo Sector.”

<sup>17</sup> *Id.* at v.

<sup>18</sup> See NYCLU, JUSTICE DERAILED, (Nov. 2011), available at [www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf) (last visited May 12, 2015).



on a large number of new agents,<sup>19</sup> and yet the agency has largely failed to adopt reforms such as those related to agents' use of force, contrary to the express recommendations of national law enforcement experts.<sup>20</sup> Meanwhile, oversight bodies like the DHS Office of Inspector General (OIG) and Office for Civil Rights and Civil Liberties (CRCL) – lacking in both enforcement authority and internal transparency – have not kept pace with Border Patrol's rapid growth.<sup>21</sup> As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding the full extent and impact of wide-ranging Border Patrol operations.

## PURPOSE

The purpose of this request is to provide the public with information regarding Border Patrol's practices and procedures relating to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement. Border enforcement questions go to the heart of the Constitution—and are central to our nation's debates on immigration enforcement and reform—and thus are matters of great public concern. The public has a right to review such practices and procedures in order to ensure that constitutional safeguards are respected and the rights of the most vulnerable are upheld.<sup>22</sup> Your prompt compliance in providing the records herein requested is necessary to vindicate the public's right

<sup>19</sup> See Rob O'Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, available at [www.azcentral.com/news/arizona/articles/20131216border-agents-assisting-local-police.html](http://www.azcentral.com/news/arizona/articles/20131216border-agents-assisting-local-police.html) (“During its hiring surge, the Border Patrol scaled back training and relaxed requirements — such as not requiring a high-school diploma. It sometimes skipped background checks, leading to problems with corruption and poorly trained agents.”) (last visited May 12, 2015).

<sup>20</sup> See Brian Bennett, *Border Patrol Sees Little Reform on Agents' Use of Force*, Los Angeles Times, February 23, 2015, available at [www.latimes.com/nation/la-na-border-abuse-20150223-story.html#page=1](http://www.latimes.com/nation/la-na-border-abuse-20150223-story.html#page=1) (last visited May 12, 2015).

<sup>21</sup> While CBP's budget increased by 97 percent from FY 2004 to FY 2012, OIG's budget increased by only 70 percent during this same time period, while CRCL's budget increased only 56 percent. Overall, the combined budget of the OIG and CRCL accounted for less than .005 percent of the total DHS budget in FY 2011. See DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2004 ANNUAL PERFORMANCE PLAN 6 (2004), available at [www.oig.dhs.gov/assets/OIG\\_APP\\_FY04.pdf](http://www.oig.dhs.gov/assets/OIG_APP_FY04.pdf) (Last visited May 12, 2015); DEP'T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at [www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf](http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf) (last visited May 12, 2015); DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011 AND ANNUAL REPORT TO CONGRESS, 6 (June 2012), available at [www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf](http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf) (last visited May 12, 2015).

<sup>22</sup> The public's right to these records is clear. In another recent case, a federal district court repeatedly ordered a local New York CBP office to search for and produce similar documents regarding the office's procedures and practices. *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 382 (S.D.N.Y. 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 10 Civ. 2705 SAS, 2011 WL 4599592 (S.D.N.Y. Sept. 30, 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287 (S.D.N.Y. 2011); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F.Supp.2d 331 (S.D.N.Y. 2011).

to be part of an “informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the governors accountable to the governed.”<sup>23</sup>

## RECORDS REQUESTED

As used herein, the term “records” should be understood broadly, and includes all records or communications preserved in electronic or written form, including but not limited to: correspondence, emails, documents, data, statistics, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, policies, procedures, memoranda, agreements, instructions, training materials, notes (including handwritten), orders, legal opinions, protocols, reports, manuals, technical specifications, studies, or any other record of any kind.

Should any responsive record contain the personal identifying information of any individual stopped or detained by the U.S. Border Patrol, or any other DHS entity, Requesters ask that the agencies redact that information. This Request seeks aggregate stop data and records relevant to USBP operations, *not* any personal or identifying information about any specific individual(s), such as individual names or A-numbers.

**Unless otherwise noted, all requests are for the Fiscal Years 2012 through 2014. In addition, all requests are for records for the Detroit Sector, except that, where noted under section A.1., records from the Buffalo and Tucson sectors are also requested.**

Specifically, Requesters seek:

### A. Documents Related to Daily Apprehension Logs:

1. **Daily Apprehension Logs for the Detroit, Buffalo and Tucson Sectors.** This includes, but is not limited to all data and statistics relating to:
  - a. Sex
  - b. Adult/Juvenile Age
  - c. Status at Entry
  - d. Entry Landmark
  - e. Arrest Landmark
  - f. Arrest Method (e.g., Other Agency, Patrol Border)
  - g. Deportable
  - h. Status When Found
  - i. Time in U.S.

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<sup>23</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1979).

- j. Port of Entry
- k. Disposition
- l. Nationality/ Country of Citizenship;
- m. Remarks – Principal/Smuggled
- n. Apprehending Officer Name(s)
- o. Apprehending Officer's Assigned Station
- p. Complexion
- q. Criminal Record
- r. Event Number

**B. Documents Showing Individual Stops and Detentions**

1. Copies of all Form I-213s ("Record of Deportable/Inadmissible Alien") for the Detroit Sector:
  - a. For each individual detained or taken into custody; and
  - b. For each individual transferred to USBP by state or local law enforcement officials.
2. Copies of all Form I-44s ("Report of Apprehension or Seizure") for the Detroit Sector:
  - a. For each individual transferred to USBP by state or local law enforcement officials; and
  - b. For each individual stopped but not arrested by USBP for whom I-44's were issued.
3. For the Detroit Sector, all records that provide possible codes and/or words and/or phrases (hereinafter "code(s)"), along with explanations of those codes, that could be filled in by USBP on the Daily Apprehension Logs, I-213 forms and I-44 forms, including any records related to the meaning of codes:
  - a. Under "Method of Location/Apprehension";
  - b. Under "Status when Found";
  - c. Under "Criminal Record"; and

- d. Under "Cmplxn," and any records that instruct, guide, or train officers about how to determine how to classify arrestees by their complexion.

### **C. Documents Related to Interior Enforcement**

1. For the Detroit Sector, all records setting forth policies and procedures related to the planning and/or implementation of USBP interior enforcement actions, including raids, patrols, and other contact with members of the public for the purpose of enforcing immigration law. This includes:
  - a. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding the circumstances under which CBP agents may participate in task forces with local law enforcement or provide operational backup to state or local law enforcement, or under which CBP agents may enforce state law.
  - b. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding USBP agents' use of race or ethnicity as a factor in law enforcement decisions.
  - c. All records describing, defining or delimiting USBP's patrol areas, including but not limited to maps of patrols or patrol areas and maps of apprehensions.
  - d. All records containing guidance, including but not limited to that from other federal agencies or components of the Department of Homeland Security, regarding enforcement activities related to specific nationalities, ethnicities, faith communities or groups. This includes any guidance regarding what conditions or activities constitute suspicious activity authorizing or requiring scrutiny or contact by USBP personnel.
  - e. All records regarding when and under what circumstances it is appropriate for USBP to engage in particular methods of law enforcement, including but not limited to pedestrian stops, vehicle stops, stops based on reasonable suspicion or consent, searches authorized by court-issued warrants or based on consent.
2. All records, including emails, relating to policies and procedures for collaboration between USBP and state or local law enforcement agencies in the Detroit Sector on the following issues:
  - a. Operational backup or support provided by USBP personnel to state or local law enforcement agencies;
  - b. Multi-jurisdictional task force activities that include USBP personnel;
  - c. The investigation of the immigration status of crime victims or witnesses;

- d. Racial or ethnic profiling and/or racial or ethnic profiling concerns.
3. For the Detroit Sector, all records that contain any information regarding arrest quotas, targets, goals and expectations that USBP or its personnel were required to meet from fiscal year 2008 to the present.
4. Performance review standards for USBP and its personnel from fiscal year 2008 to the present.

**D. Documents Related to Complaints**

1. Any records within the possession of the CBP concerning complaints received and/or investigated by DHS, any DHS subcomponents, including CBP internal affairs, the Office for Civil Rights and Civil Liberties (CRCL), Office of Inspector General (OIG); Office of Professional Responsibility (OPR) and internal affairs against CBP or its agents or employees in the Detroit Sector, including but not limited to:
  - a. Complaints alleging misconduct with respect to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement;
  - b. Complaints received through any complaint line or email box or through referral from CBP, CRCL, OIG, OPR or any other agency within DHS;
  - c. All disciplinary actions taken in response to any such complaints.

We request that responsive electronic records be provided electronically in their native file format, if possible. 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agencies' possession, and that the records be provided in separate, Bates-stamped files. We further request that reasonable metadata be transmitted along with responsive documents, including but not limited to email attachments, author and recipient information, date and time stamps, and the like.

**REQUEST FOR EXPEDITED PROCESSING**

Requester seeks Track 1 expedited processing for this FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(E)(i) ("Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—(I) in cases in which the person requesting the records demonstrates a compelling need . . . .").

A "compelling need" exists when "a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." 5 U.S.C. § 552(a)(6)(E)(v)(I); *see also* 6 C.F.R. § 5.5(d)(1)(i). Without expedited disclosure of the requested records, individuals in USBP custody may face

continuing, imminent threats to their life or physical safety. This is particularly true given the volume and persistent nature of the alleged abuses outlined above. There is thus a “compelling need” for the requested records.

A “compelling need” can also be demonstrated “with respect to a request made by a person primarily engaged in disseminating information,” by an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Here, the ACLU and MIRC are “person[s] primarily engaged in disseminating information,” and there is an urgent need to inform the public regarding Border Patrol activities.

With respect to the ACLU, dissemination of information to the public about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU seeks to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has a particular commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status, and that government respects the civil and human rights of all people. Educating the public is a central to this work. Specifically, the ACLU publishes a blog, newsletters, reports, fact sheets, news briefings, “Know Your Rights” documents, and other educational and informational materials that are designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These ACLU publications often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.”).

The website of the ACLU of Michigan ([www.aclumich.org](http://www.aclumich.org)) addresses civil rights and civil liberties issues in depth, provides information on civil rights and civil liberties issues in the news, and contains a large volume of documents relating to the issues on which the ACLU is focused, including immigration. The websites of the National ACLU and other state ACLU affiliates similarly feature information obtained through the FOIA process.<sup>24</sup> The ACLU further disseminates information to the public via social media platforms such as Facebook and Twitter.

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<sup>24</sup> See, e.g., THE TORTURE DATABASE, <http://www.thetorturedatabase.org> (last visited May 12, 2015); MAPPING THE FBI, <http://www.aclu.org/mappingthefbi> (last visited Mar. 16, 2015); see also, e.g., Press Release, ACLU of San Diego & Imperial Counties, CBP Releases Report, New Training Handbook (May 22, 2014), <http://www.aclusandiego.org/radio-silence-border-patrol-use-force-policies-leads-lawsuit/> (last visited May 12, 2015).

ACLU materials are specifically designed to be educational and are widely disseminated to the public.<sup>25</sup> These materials are widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through the ACLU's public education department and websites. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Similarly, MIRC, which is a legal resource center for Michigan's immigrant communities, is heavily engaged in disseminating information. MIRC disseminates information about topics affecting immigrants and refugees via a variety of media including its website, social media, and an email newsletter service. The MIRC website ([michiganimmigrant.org](http://michiganimmigrant.org)) provides extensive information on immigration-related issues. The website includes a library of materials used by community advocates. It includes a database of documents previously obtained through FOIA from Immigration and Customs Enforcement.<sup>26</sup> In the past two years, the website has received 78,147 page views from 18,162 unique users seeking information. Last year, MIRC made presentations about immigration law and immigrant rights to more than 3,800 individuals and responded to 483 requests for technical support from attorneys and advocates.

Depending on the results of this Request, the ACLU and MIRC plan to disseminate the information they receive among the public through these kinds of publications in these kinds of channels. The ACLU and MIRC are therefore organizations "primarily engaged in disseminating information" within the meaning of the statute and the relevant regulations. Indeed, the fact that that ACLU meets these criteria has previously been recognized in FOIA litigation between the ACLU and the Department of Justice. *See, e.g., American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information" (internal citation omitted)).

Moreover, this Request concerns actual or alleged federal government activity that is a matter of current exigency. As discussed above, allegations against CBP of abuse, neglect, excessive force and racial profiling have persisted for years, attracting considerable, sustained media coverage and public attention.<sup>27</sup> Furthermore, the nation is engaged in an ongoing, time-

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<sup>25</sup> *See, e.g.,* Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (Mar. 28, 2014, 12:29 PM), <http://slate.me/1jg5YXx> (describing national ACLU's efforts to broadly disseminate important civil rights-related news stories) (last visited May 12, 2015).

<sup>26</sup> "ICE Training Documents", available at [www.michiganimmigrant.org/resources/library](http://www.michiganimmigrant.org/resources/library) (last visited May 12, 2015).

<sup>27</sup> *See, e.g., Editorial: Put Limits on Border Patrol*, BOSTON GLOBE, Jan. 1, 2015, available at <http://bit.ly/1rI5K2t> (last visited May 12, 2015); Ed Pilkington, *Freezing Cells and Sleep Deprivation: The Brutal Conditions Migrants Still Face After Capture*, GUARDIAN, Dec. 12, 2014, available at <http://bit.ly/1uxlzVi> (last visited May 12, 2015); Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO, Nov./Dec. 2014, available at <http://politi.co/1tB4CS> (last

sensitive debate about immigration reform, and the extent to which the activities of Border Patrol should be expanded. Current, comprehensive information about USBP's activities is urgently needed in order to ensure that this debate is based on an accurate understanding of those activities. Yet CBP has consistently failed to turn over information that ought to be made available to the public, and that is necessary to inform public debate.<sup>28</sup> Any discussion of modifying Border Patrol's role as part of immigration reform must be premised on an understanding of Border Patrol's current practices. Given the fast-moving immigration debate, there is an urgent need for the documents requested here.

For all of the foregoing reasons, expedited processing of this Request is warranted and should be granted. Requesters hereby certify that the foregoing is true and correct to the best of their knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3).

### REQUEST FOR A WAIVER OR LIMITATION OF SEARCH AND REVIEW FEES

The Requesters seek a full waiver of all fees because disclosure of the requested records is in the public interest." See 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.").

At a minimum, should a total fee waiver be denied, Requesters seek a waiver of all processing (search and review) fees because the ACLU and MIRC qualify as "representatives of the news media," because Mr. Boyce and Dr. Oglesby qualify as researchers at an educational institution, and because the records are not sought for commercial use. See 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees should be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution; or a representative of the news media"); 6

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visited May 12, 2015); Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion In Agency*, NPR, Aug. 28, 2014, available at <http://n.pr/1p9YST8> (last visited May 12, 2015); Andrew Becker, *Border Agency's Former Watchdog Says Officials Impeded His Efforts*, WASH. POST, Aug. 16, 2014, available at <http://wapo.st/1rNoBnz> (last visited May 12, 2015); Andrew Becker, *Removal of Border Agency's Internal Affairs Chief Raises Alarms*, CTR. FOR INVESTIGATIVE REPORTING, June 12, 2014, available at <http://bit.ly/1v6mRbM> (last visited May 12, 2015); Karen McVeigh, *Immigration Groups Allege Abuse of Migrant Minors by US Border Patrol*, GUARDIAN, June 11, 2014, available at <http://bit.ly/1tqi70g> (last visited May 12, 2015); Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. TIMES, May 5, 2014, available at <http://nyti.ms/1BgT7fr> (last visited May 12, 2015).

<sup>28</sup> See *Ohio State University Moritz College of Law Civil Clinic et al. v. U.S. Customs and Border Protection*, No. 14-2329 (S.D. Ohio Nov. 18, 2014); *Arizona Civil Liberties Union Foundation of Arizona, Derek E. Bambauer and Jane Yakowitz Bambauer v. U.S. Department of Homeland Security* No. 15-00247 (D.AZ. Feb. 11, 2015); *American Civil Liberties Union of San Diego and Imperial Counties v. United States Department of Homeland Security*, 8:15 CV 00229-JLS-RNB (C.D. Cal., filed Feb. 20, 2015); *Brown, et al. v. USCBP and USDHS*, 15-cv-01181-JD (N.D. Cal. Mar. 12, 2015).



C.F.R. § 5.11(d)(1) (search fees shall not be charged “for requests by educational institutions . . . or representatives of the news media”); *id.* § 5.11(k)(1) (“Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that (i) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.”). As discussed below, federal agencies routinely grant such fee waivers for FOIA requests made by the ACLU and similar organizations for these reasons.

**A. Release of the requested records is in the public interest.**

The records requested will contribute significantly to public understanding of the government’s operations or activities. Under 6 C.F.R. § 5.11(k)(2), the following factors are to be considered in determining whether a disclosure is in the public interest: (i) whether the subject of the requested records concerns “the operations or activities of the government”; (ii) whether the disclosure is “likely to contribute” to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to “public understanding,” that is, “the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *See* 6 C.F.R. § 5.11(k)(2)(i)–(iv). Each of these considerations is satisfied here.

First, the records requested pertain directly to the operations and activities of the federal government (specifically, CBP and one of its subcomponents, the U.S. Border Patrol).

Second, this Request is “likely to contribute” to an understanding of government operations or activities, specifically by helping the public understand Border Patrol’s immigration enforcement policies and practices, including racial profiling and its’ efforts to work with local law enforcement. Given the current debate on comprehensive immigration reform, and ongoing debates over local and state law enforcement’s cooperation with federal immigration enforcement, few issues are more important to the public. Border Patrol’s practices and procedures regarding racial profiling have received national attention, addressed both by Congress during the drafting of comprehensive immigration reform and by the media due to the advocacy of immigrant rights groups and various lawsuits filed against Border Patrol.<sup>29</sup>

Third, disclosure of the requested information will contribute to “the understanding of a reasonably broad audience of persons interested in the subject” of how individuals detained by USBP are treated while in USBP custody. Among other things, Mr. Boyce and Dr. Oglesby intend to conduct detailed scholarly analysis of the data obtained, in order to assess such factors as the proximity to the border of Border Patrol arrests and what proportion of arrestees are recent

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<sup>29</sup> *See, e.g.,* Brian Bennett, *Immigration rights groups accuse officials of racial profiling*, L.A. TIMES, Mar 13, 2013; Manuel Valdes, *ACLU Sues Border Patrol Over Alleged Racial Profiling in Pacific Northwest Border*, HUFF. POST, Apr. 27, 2012; Rebekah L. Cowell, *Raleigh church members sue feds, allege racial profiling*, INDY WEEK, Mar. 2, 2011.

border crossers. Moreover, the ACLU and MIRC intend to publish responsive records and develop reports or analyses regarding USBP's enforcement practices.

Finally, disclosure will contribute "significantly" to the public's understanding of U.S. Border Patrol detention policies and practices. As noted, issues surrounding CBP arrest and detention policies and practices have garnered significant and sustained public and media attention, yet much remains unknown about this critical civil and human rights issue.

The Requesters have thus established, "with reasonable specificity[,] that [their] request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government." *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 107–109 (D.D.C. 2006).

#### **B. The ACLU and MIRC qualify as representatives of the news media.**

At a minimum, should a total fee waiver be denied, "fees should be limited to reasonable standard charges for document duplication" because the ACLU and MIRC are "representative[s] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The ACLU and MIRC both meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. 522(a)(4)(A)(ii); 6 C.F.R. § 5.11 (b)(6); *see also Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that "gathers information from a variety of sources," exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA). The ACLU and MIRC are "representatives of the news media" for the same reasons that they are "primarily engaged in the dissemination of information." *See Electronic Privacy Information Center*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for FOIA purposes); *ACLU v. Department of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information").<sup>30</sup> Courts have found other organizations whose mission, function,

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<sup>30</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2012, the Bureau of Prisons granted a fee waiver to the ACLU for a FOIA request seeking documents concerning isolated confinement of prisoners in BOP custody. In March 2012, the Department of Justice Criminal Division granted a fee waiver to the ACLU for a FOIA request seeking records about the government's access to the contents of individuals' private electronic communications. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the

publishing, and public education activities are similar in kind to the Requesters to be “representatives of the news media.” See, e.g., *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester). Indeed various federal courts have specifically held that the ACLU is a “representative of the news media.” See, e.g., *Service Women’s Action Network v. Department of Defense*, 888 F. Supp. 2d 282, 287–88 (D. Conn. 2012) (holding that that the national ACLU and ACLU of Connecticut are “representatives of the news media”); *American Civil Liberties Union of Washington v. Department of Justice*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

### C. Mr. Boyce and Dr. Oglesby Qualify as Researchers at an Educational Institution

Geoffrey Alan Boyce is a doctoral candidate in the School of Geography and Development, at the University of Arizona, which is an educational institution. From 2011-2013 he was a National Science Foundation Graduate Research Fellow. He has conducted research supported by the National Science Foundation, the Tinker Foundation, the ConfluenCenter for Creative Inquiry, and the University of Arizona Social and Behavioral Sciences Research Institute. His research work has covered a number of topics, including international relations, transnational migration and U.S. immigration policy. He has had peer-reviewed work published (or accepted for publication) in scholarly journals including: *Geopolitics; Area; Territory, Politics and Governance*; the *Arizona Journal for Interdisciplinary Studies*; as well as the University of Georgia Press. Mr. Boyce has professional training in qualitative and mixed-methods research; statistical data analysis; and Geographic Information Systems (GIS).

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PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Dr. Elizabeth Oglesby is an Associate Professor in the School of Geography and Development and the Center for Latin American Studies at the University of Arizona. Dr. Oglesby's research focuses on issues related to immigration, globalization and labor, human rights, and Central America. Dr. Oglesby has published peer-reviewed work in a number of scholarly venues including *Environment and Planning D; Space and Polity; Geoforum*; and Duke University Press. Dr. Oglesby has also served as editor of the *Central America Report*, a weekly bulletin of economic and political news analysis published by Inforpress Centroamericana in Guatemala City; an associate editor for the *NACLA Report on the Americas*, the largest circulating English-language publication of Latin American affairs; and a correspondent for *Latinamerica Press*, a hemispheric news service based in Lima, Peru.

Beginning in the late 1990s Dr. Oglesby served as a consultant to the Guatemalan Commission for Historical Clarification (Truth Commission) of the United Nations Office of Project Services in Guatemala City, serving as the assistant to the coordinator of the final report, the coordinator of historical and regional context materials, and a member of the writing team of the final report. In 2013, Dr. Oglesby served as an expert witness in the trial of former Guatemalan President Efraín Ríos Montt, who was charged with genocide and crimes against humanity for presiding over the deaths of 1,700 Maya in 1982-83. Dr. Oglesby's present research examines the transnational affects of immigration enforcement activity on host and sending communities in Guatemala, Mexico and the United States.

Mr. Boyce and Dr. Oglesby intend to analyze the documents obtained through this FOIA request, and subject the information these contain to spatial and statistical analysis, to examine enforcement patterns; how these may or may not unevenly concentrate on specific regions and populations; and whether or not USBP enforcement activities in the Detroit Sector differ meaningfully from patterns observed in other USBP enforcement sectors. Mr. Boyce and Dr. Oglesby will publish scholarly work based on the analysis conducted on the documents obtained through this FOIA request. This analysis will be relevant to scholars in a number of academic fields who study patterns and practices of immigration and law enforcement in the United States. These fields include geography, anthropology, sociology, criminology, area studies and migration studies.

Both Mr. Boyce and Dr. Oglesby qualify as researchers at an educational institution under the Freedom of Information Act and its implementing regulations. *See* 28 C.F.R. § 16.11(b)(4). Thus, they should not be charged search or review fees for this Request. *Id.*

**D. Disclosure of the information requested is not in the commercial interest of the Requesters.**

Disclosure of the information requested is not in the commercial interest of the ACLU, MIRC, Mr. Boyce or Dr. Oglesby.

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For the foregoing reasons, a fee waiver or limitation should be granted. A fee waiver would also fulfill Congress's legislative intent in amending FOIA, namely to ensure that the Act

is liberally construed in favor of granting waivers for noncommercial requesters and to effectuate disclosure of documents of public importance. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (internal quotation marks and citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that “disclosure, not secrecy, is the dominant objective of the Act,” quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1991)).

Should a total waiver be denied, fees should be “limited to reasonable standard charges for document duplication,” as the Requesters are non-profit institutions and educational researchers seeking such records not for a commercial purpose, but rather to disclose such records through the news media, and put them to use for research purposes. 5 U.S.C. § 552(a)(4)(A)(ii)(II). While it is permissible to charge document duplication fees to educational institutions and representatives of the news media, Requesters are seeking documents in an electronic format. Hence there should be no, or at most, negligible document duplication costs.

If a fee waiver is denied, the Requesters are prepared to pay fees up to \$100.00. We ask that you inform us first if fees in excess of \$100.00 may be charged, though we reserve the right to appeal a denial of fee waivers.

The Requesters certify that the above information is true and correct to the best of the requesters’ knowledge. 6 C.F.R. § 5.5(d)(3).

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Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4). We further expect your reply to the Request itself within twenty (20) days, as required under 5 U.S.C. § 552(a)(6)(A)(i). If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material. In addition, we request that you provide an estimated date on which you will complete the processing of this request. 5 U.S.C. § 552(a)(7)(B). We reserve the right to appeal a decision to withhold any information.

Please furnish the requested records electronically to all of the following:

Geoffrey Boyce  
Tel: 520-621-5096  
Fax: 520-621-2889  
[gboyce@email.arizona.edu](mailto:gboyce@email.arizona.edu)  
School of Geography and Development  
The University of Arizona  
P.O. Box 210076, Box #2  
Tucson, AZ 85721-0076

Elizabeth Oglesby  
Tel: 520-626-6559

[eoglesby@email.arizona.edu](mailto:eoglesby@email.arizona.edu)  
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Grand Rapids, MI 49506

Susan Reed  
Tel: 269-492-7196  
[susanree@michiganimmigrant.org](mailto:susanree@michiganimmigrant.org)  
Michigan Immigrant Rights Center  
3030 S 9<sup>th</sup> St Suite 1A  
Kalamazoo, MI 49009

Should you need to communicate with us regarding this Request, please contact us by email or phone at the addresses listed above.

Thank you in advance for your prompt assistance.

Sincerely,

*Geoffrey Boyce (ms)*

Geoffrey Boyce  
School of Geography and Development  
The University of Arizona

*Dr. Elizabeth Oglesby (ms)*

Dr. Elizabeth Oglesby  
School of Geography and Development  
The University of Arizona

*Miriam Aukerman*

Miriam Aukerman  
ACLU of Michigan

*Susan Reed (ms)*

Susan Reed  
Michigan Immigrant Rights Center

# **EXHIBIT A**

**100 Air Mile Zone**





## EXHIBIT C

Resubmission of May 21, 2015 FOIA through  
FOIA Online System  
(July 13, 2015)

## Request Confirmation

### Request Information

Tracking Number : *CBP-2015-042176*

Requester Name : Ms. Miriam Aukerman

Date Submitted : 07/13/2015

Request Status : Submitted

Description :

Please see the attached FOIA request that was originally submitted on May 21, 2015 by mail and by email to [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). We have received no response and therefore are resubmitting this FOIA here.

## EXHIBIT D

FOIA Online System Receipt for Resubmission of May 21, 2015  
FOIA Request through FOIA Online System  
(July 13, 2015)

## Elvira Hernandez

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**From:** Elvira Hernandez  
**Sent:** Thursday, October 13, 2016 12:30 PM  
**To:** Elvira Hernandez  
**Subject:** FW: FOIA Request CBP-2015-042176 Submitted

From: [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [CBPFOIA@cbp.dhs.gov]  
Sent: Monday, July 13, 2015 3:23 PM  
To: Miriam Aukerman  
Subject: FOIA Request CBP-2015-042176 Submitted

This message is to confirm your request submission to the FOIAonline application: View Request<<https://foiaonline.regulations.gov:443/foia/action/public/view/request?objectId=090004d2807f66b4>>. Request information is as follows:

- \* Tracking Number: CBP-2015-042176
- \* Requester Name: Miriam Aukerman
- \* Date Submitted: 07/13/2015
- \* Request Status: Submitted
- \* Description: Please see the attached FOIA request that was originally submitted on May 21, 2015 by mail and by email to [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). We have received no response and therefore are resubmitting this FOIA here.

## EXHIBIT E

E-mail from CBPFOIA@cbp.dhs.gov Denying  
Expedited Processing  
(October 6, 2015)

## Elvira Hernandez

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**From:** Elvira Hernandez  
**Sent:** Thursday, October 13, 2016 12:25 PM  
**To:** Elvira Hernandez  
**Subject:** FW: FOIA Expedited Processing Disposition Reached for CBP-2015-042176

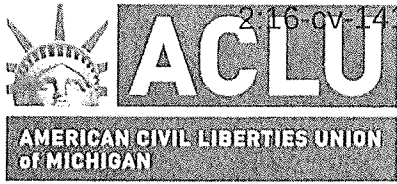
From: [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [CBPFOIA@cbp.dhs.gov]  
Sent: Tuesday, October 06, 2015 10:14 AM  
To: Miriam Aukerman  
Subject: FOIA Expedited Processing Disposition Reached for CBP-2015-042176

Your request for Expedited Processing for the FOIA request CBP-2015-042176 has been denied. Additional details for this request are as follows:

- \* Request Created on: 07/13/2015
- \* Expedited Disposition Reason: Does not meet requirements per DHS Regulations.
- \* Request Long Description: Please see the attached FOIA request that was originally submitted on May 21, 2015 by mail and by email to [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). We have received no response and therefore are resubmitting this FOIA here.

## EXHIBIT F

Aukerman Letter Appealing Denial of Expedited Processing  
(October 14, 2015)



October 14, 2015

Port Director Roderick Blanchard  
U.S. Customs and Border Protection  
2810-B W. Fort Street, Ste 123  
Detroit, Michigan 48216

**Re: FOIA Request, CBP-OFO-2015-014066  
FOIA Request, CBP-OFO-2015-014083**

Dear Director Blanchard:

I am writing to follow up on several matters related to the FOIA request of the American Civil Liberties Union of Michigan, dated January 15, 2015, CBP-OFO-2015-014066; CBP-OFO-2015-014083.

### **Incompleteness of Responsive Documents**

To date, 174 pages of documents responsive to items 1-3 of the FOIA request have been released. The on-line tracking system shows that these documents were part of an "interim release," dated 5/7/2015. It is unclear to me whether the fact that this production is described as an "interim release" indicates that you are continuing to search for additional responsive documents. To my knowledge, no other documents have yet been released.

I am writing to inform you that we believe various written documents, videotapes and audiotapes responsive to the request exist, but have not yet been released. Thus, if the "interim release" was intended to be a comprehensive response to items 1-3, it is incomplete.

We believe that the following items exist, or are likely to exist, but have not been produced:

1. Video and audio tape at the Ambassador Bridge CBP facility on October 23, 2013 that relates to the stop and detention of Mr. Pastor or Mr. Rodriguez. This specifically includes the video tape of Ms. Pastor's conversation with Supervisor Lemeaux.
2. An audio recording made on the female officer's cell phone while both Mr. Rodriguez and Ms. Pastor were in the CBP vehicle being transported to the holding cells. It is our understanding that the officer decided to record this conversation because Mr. Rodriguez and Ms. Pastor were speaking in Spanish, and the officer did not understand what they were saying. We request a copy of the entire audio recording, as well as copies of any translations that were made.
3. Jorge Rodriguez' signed and sworn statement, including the typed question and answers that he signed on October 23, 2013. It is our understanding that a male officer was typing and Officer Martinez was translating when this statement was given. If there are copies in English and Spanish, please provide both.



4. Reports written by the CBP officers in the additional vehicles that were present at the scene of the arrest and handcuffing of Ms. Pastor and Mr. Rodriguez.
5. All in-car video recordings made by an CBP vehicle located within .2 miles of Ms. Pastor and/or Mr. Rodriguez with 10 minutes prior to their detention or at any time during their detention.
6. A complete copy of Jorge Rodriguez's T file, which would have been created at the Ambassador Bridge relating to the October 23, 2013 incident.

I ask that you promptly conduct a thorough search for these items, and for any other responsive documents that have been withheld, and provide those to me.

#### **Prompt Processing After Fee Waiver Determination**

As you are aware, the ACLU of Michigan has made a payment of \$978.85 to obtain the items listed in section 1 of the FOIA, which you previously indicated also encompasses items 2 and 3. We simultaneously appealed the denial of the fee waiver. *See* Aukerman Letter to Blanchard (April 14, 2015); Aukerman Letter to Assistant Commissioner (April 15, 2015).

We have now received a response to the fee waiver appeal. In a letter dated September 22, 2015, Shari Suzuki, Chief of FOIA Appeals, states that with respect to items 1-5, the ACLU of Michigan should only be charged duplication costs. We are not to be charged any fees with respect to processing items 6-9.

To date we have not received any documents responsive to items 4-9. I ask that you please promptly provide all documents responsive to those requests. For the reasons set out above, we believe that the response to documents 1-3 is incomplete. Those documents too should be promptly provided.

In addition, we ask for an accounting that shows what charges have been assessed against our payment of \$978.85, what the balance is that will be returned, and when that payment will be sent to us. To date, the only costs that should have been charged are duplication expenses for the 174 pages of documents produced that are responsive to items 1-3. We received those documents electronically, and therefore the duplication expenses, if any, should be negligible. Accordingly we anticipate that you will refund all or virtually all of our \$978.85 payment.

I recognize that there may be additional small duplication expenses going forward. Please provide a projection of the duplication expenses that will be required to fully respond to 1-3 and provide documents responsive to 4-5. Please promptly send payment in the amount of \$978.85 minus electronic duplication costs (if any) for the 174 pages of released documents minus projected duplication costs for the remaining documents.

We look forward to receiving the outstanding documents. Please do not hesitate to contact me at 616 301 0930 should you wish to discuss this matter.

Sincerely,



Miriam Aukerman  
Staff Attorney

## EXHIBIT G

E-mail from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Regarding Fee Waiver  
(October 21, 2015)

**Elvira Hernandez**

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**From:** Elvira Hernandez  
**Sent:** Thursday, October 13, 2016 12:20 PM  
**To:** Elvira Hernandez  
**Subject:** FW: FOIA Fee Waiver Disposition Reached for CBP-2015-042176

From: [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [CBPFOIA@cbp.dhs.gov]  
Sent: Wednesday, October 21, 2015 10:35 AM  
To: Miriam Aukerman  
Subject: FOIA Fee Waiver Disposition Reached for CBP-2015-042176

Your request for Fee Waiver for the FOIA request CBP-2015-042176 has been determined to be not applicable as the request is not billable. Additional details for this request are as follows:

- \* Request Created on: 07/13/2015
- \* Request Long Description: duplicate to 2015-036215

## EXHIBIT H

Aukerman Letter Appealing Failure to Make Timely  
Determination on FOIA Request and Reiterating Appeal of  
Denial of Expedited Processing  
(November 19, 2015)



Regulations.” Because this bald statement provides no basis for understanding why our request was denied, we appeal. Once the agency provides a basis for the denial of expedited processing, I can address any justifications given. But it is impossible to respond on the merits to a denial where the agency has failed to articulate a reason for the denial.

Finally, as of the date of this letter, the government has not responded to the Freedom of Information Act Request, originally submitted on May 21, 2015, and resubmitted (due to lack of response) on July 13, 2015. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, requires that all federal agencies respond to any request for records within 20 business days. U.S.C. § 552(a)(6)(A)(i). That 20-day period has long since elapsed.

To date, we have received no substantive response to the FOIA request. This failure to respond can be construed as a constructive denial. 5 U.S.C. § 552(a)(6)(A). Accordingly, we hereby appeal DHS’s failure to make a timely determination regarding the FOIA request.

Sincerely,



Miriam Aukerman  
Staff Attorney

cc: Geoffrey Boyce  
Dr. Elizabeth Oglesby  
Susan Reed

## INDEX OF EXHIBITS

- A. Plaintiffs' FOIA Request (May 21, 2015)
- B. Cover Email for Submission of FOIA Request (May 21, 2015)
- C. Resubmission of May 21, 2015 FOIA through FOIA Online System (July 13, 2015)
- D. FOIA Online System Receipt for Resubmission of May 21, 2015 FOIA Request through FOIA Online System (July 13, 2015)
- E. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Denying Expedited Processing (October 6, 2015)
- F. Aukerman Letter Appealing Denial of Expedited Processing (October 14, 2015)
- G. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) Regarding Fee Waiver (October 21, 2015)
- H. Aukerman Letter Appealing Failure to Make Timely Determination on FOIA Request and Reiterating Appeal of Denial of Expedited Processing (November 19, 2015)
- I. Howard Letter Re Initial Response to FOIA Request (January 12, 2016)
- J. Administrative Appeal Letter by Damren (February 29, 2016)
- K. Administrative Closure (May 9, 2016)
- L. Suzuki Letter Re Appeal of Expedited Processing and FOIA Online System (September 30, 2016)
- M. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 21, 2015)
- N. Email from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman (October 30, 2015)
- O. Aukerman Email Seeking Clarification on Case Numbers (October 26, 2016)
- P. Plaintiffs' Letter Re Problems with FOIA Online System (February 26, 2016)

## EXHIBIT I

Howard Letter Regarding Initial Response to FOIA Request  
(January 12, 2016)



January 12, 2016

CBP-2015-036215

Miriam Aukerman  
ACLU  
1514 Wealthy Street, Suite 201  
Grand Rapids, MI 49506

Dear Ms. Aukerman:

This is an initial response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested a large volume of documents concerning Border Patrol practices and procedures in the Border Patrol Sector of Detroit, with the exception of part A.I., where information was also requested from the Buffalo and Tucson sectors. You further clarified that the timeframe for the request was Fiscal Year 2012 through Fiscal Year 2014, unless otherwise noted.

#### Section A of Request

An initial search of CBP databases in response to section A of your request produced a total of 4,624 pages of records responsive to your request. CBP has determined that 4,622 pages of the records are partially releasable, pursuant to Title 5 U.S.C. § 552 (b)(6), (b)(7)(C) and (b)(7)(E). The remaining two pages, consisting of codes, are released in full.

Please note that no redactions appear on the spreadsheet that summarizes the information. In the interest of time and providing a faster response, the following columns were removed from the data:

- Entry Landmark, Arrest Landmark, Apprehending Officer's Assigned Station, and Event Number withheld in full, pursuant to Title 5 U.S.C. § 552 (b)(7)(E).
- Apprehending Officer Name(s) withheld in full, pursuant to Title 5 U.S.C. §§ 552 (b)(6), (b)(7)(C).
- Port of Entry was not included, as Ports of Entry are staffed by CBP Officers with the Office of Field Operations (OFO), not by the Border Patrol.

#### Section A of Request: Basis for Withholding Information

**Exemption (b)(6)** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. *[The types of documents and/or information that we have withheld may consist of birth certificates, naturalization certificates, driver license, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.]* The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

**Exemption (b)(7)(C)** protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate.

**Exemption (b)(7)(E)** protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

#### Remaining Sections of the Request

We are continuing to work on this request and anticipate producing a response to Section C in our next correspondence.

Section B is extremely broad. As currently written, our office determined that:

1. There are approximately 2,247 I-213 forms. I-213 forms are usually three pages long, though they can be longer. At minimum, this is approximately 6,741 pages.
2. There are approximately 3,077 I-44 forms. I-44 forms are usually three pages long, though they can be longer. At minimum, this is approximately 9,231 pages. Combined, this is a minimum of 15,972 pages of information.

We have determined that an agent would need to be pulled from their regular duties and dedicate almost two weeks to doing nothing but printing these records. The time to redact these documents would take far longer.

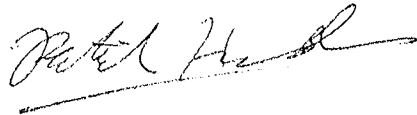
We are writing to offer a suggested approach to narrowing this request so that we can respond more quickly to it. This approach is one that we have recently utilized in responding to another, similar FOIA request filed by The Ohio State University Moritz College of Law (OSU) and Advocates for Basic Legal Equality (ABLE) directed exclusively at the U.S. Border Patrol Sandusky Bay Station, Detroit Sector (SBY). OSU and ABLE requested all I-213s and I-44s over several years. We agreed to produce 1 in 10 of these records. In this way, the selection of the records to be produced is random. It also obviously cuts the volume of records to a manageable number for the Agency to review, redact and produce in a reasonable amount of time. Please contact me at your earliest convenience so that we can discuss this approach to narrowing this section of your request.

Section D has been tasked to the Office of Internal Affairs for evaluation and potential production of documents.

You have a right to appeal our withholding determination relating to Section A of your request. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 90 K Street, NE, 10<sup>th</sup> Floor, Washington, DC 20229-1177, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

This office may be reached at (202) 325-0150. Please notate file number CBP-2015-036215 on any future correspondence to CBP related to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Howard", written over a horizontal line.

Patrick Howard  
Branch Chief  
U.S. Customs and Border Protection, FOIA Division  
Privacy and Diversity Office

Enclosure(s)

## EXHIBIT J

Administrative Appeal Letter by Damren  
(February 29, 2016)



Dykema Gossett PLLC  
400 Renaissance Center  
Detroit, MI 48243  
WWW.DYKEMA.COM  
Tel: (313) 568-6800  
Fax: (313) 568-6658  
**Samuel C. Damren**  
Direct Dial: (313) 568-6519  
Direct Fax: (855) 252-7983  
Email: SDamren@dykema.com

February 29, 2016

**FOIA APPEAL**  
**Sent Via Federal Express**  
**and First Class Mail**

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

Re: CBP-2015-036215

To Whom It May Concern:

Please allow this letter to serve as the appeal of the U.S. Customs and Border Protection's ("CBP") January 12, 2016 letter withholding information from Section A, and failing to produce any documents responsive to Sections B, C, or D of the May 21, 2015 Freedom of Information Act request submitted by the American Civil Liberties Union of Michigan, the Michigan Immigrant Rights Center, and researchers at the University of Arizona. Dykema Gossett PLLC is assisting and representing the FOIA requesters with the appeal of this matter.

A. Failure To Produce Documents Requested In Section C and D.

Section C of the FOIA requests seeks all documents related to interior enforcement, including, among other things, policies and procedures, and any relevant maps defining and delimiting CBP's patrol areas. At the outset, it appears that a map showing the zone of the CBP's defined authority should be easy to locate and produce. The time for the CBP's response has passed. CBP has failed to produce even the basic documents responsive to this request. The requesters hereby appeal CBP's failure to timely produce any responsive documents to Section C of its request.

To date, no documents have been produced that are responsive to Section D, which seeks complaints against CBP in the Detroit Sector. As such, the requesters also hereby appeal CBP's failure to timely produce any responsive documents to Section D of its request.

B. Redactions Of Documents Requested In Section A.

We are also appealing the redactions in the compilation of information produced in response to Section A of the FOIA.



February 29, 2016

Page 2

1. Exemption (b)(7)(E)

CBP removed information relating to Entry Landmark, Arrest Landmark, Apprehending Officer's Assigned Station, and Event Number, citing Title 5 U.S.C. § 552 (b)(7)(E). Subsection (E) of Exemption 7 exempts law enforcement material that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C.A. § 552(b)(7).

We do not concede the applicability of Exemption (b)(7)(E) for the redaction of this information. The Letter does not provide any reasoning or analysis as to why or how the release of the Entry Landmark, Arrest Landmark, Apprehending Officer's Assigned Station, or Event Number would disclose techniques and/or procedures for law enforcement, or would disclose guidelines for law enforcement investigations. The Letter does not give an explanation of how the requested information would risk the circumvention of the law, nor does it describe the underlying law enforcement techniques and procedures that need to be protected.

We dispute that Exemption (b)(7)(E) would apply to any of the categories of information that CBP seeks to withhold on this basis.

2. Exemption (b)(6) and (b)(7)(C)

CBP removed information relating to Apprehending Officer Name(s), citing Title 5 U.S.C. §§ 552 (b)(6), (b)(7)(C). Exemption 6 provides that the government is exempt from disclosing "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Such files are not per se exempt; rather, the Supreme Court has found that it is "the balancing of private against public interests, not the nature of the files that governs the applicability of Exemption 6."<sup>1</sup> There is generally a presumption in favor of disclosure, and it is the government's burden to prove that Exemption 6 applies.<sup>2</sup>

Here, the Apprehending Officer would have provided the information used to compile the remaining information. Exemption (b)(6) does not generally apply where the information sought merely identifies the name of a government official who authored reports or information.<sup>3</sup> Identifying the name of the Apprehending Officer does not fall under Exemption (b)(6).

<sup>1</sup> *Dep't. of State v. Wash. Post. Co.*, 465 U.S. 595, 599-600 (1982).

<sup>2</sup> *See Bernard v. Dep't of Homeland Security*, 598 F. Supp. 2d 1, 17 (D.D.C. 2009).

<sup>3</sup> *Families for Freedom*, 837 F. Supp. 2d at 301; *see, e.g., National Day Laborer* 811 F. Supp. 2d at 747-48 (noting that, courts (the D.C. Circuit) could not have contemplated that the Government would in 2011 be making regular across the board assertions of privacy interests in the names, titles, places of work, and contact information of



February 29, 2016

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Even if the names of the Apprehending Officer(s) were to fall into the exempt category, however, withholding this information still would not be justified. The FOIA request does not seek personal phone number, e-mail addresses, or extensive employment history information. As such, the risk of harassment is minimal because the information withheld does not reveal any personal information about the employees. In contrast, releasing the information would serve the purpose of FOIA by opening agency action to public scrutiny and fostering further understanding of government activities. To the extent conduct of concern or interest to the public is uncovered in the documents provided under the FOIA, the names of the Apprehending Officer(s) becomes of greater public interest in that it would shed light on whether there are systemic or individual conduct that potentially result from a lack of training or other causes.

Under Exemption (b)(7)(C), CBP has withheld the name of the Apprehending Officer(s), stating that it could reasonably be expected to constitute an unwarranted invasion of personal privacy. The Letter does not state any legitimate and non-speculative privacy interest in not revealing the name of the Apprehending Officer(s) to the public. Moreover, as discussed above, there is a strong public interest in disclosing the names of Apprehending Officer(s) that may show patterns of conduct of concern or interest to the public by individuals or systemic direction.

As such we dispute that Exemption (b)(6) and (b)(7)(C) applies and asserts that the names of the Apprehending Officer(s) were wrongly withheld and we appeal this withholding.

#### C. Documents Responsive to Section B

At this time, we are not willing to agree to a 1 in 10 sampling of the I-213 forms or the I-44 forms. We do not believe that receiving an arbitrary 10% of the documents without some justification of the validity of such a sampling would create a meaningful basis for deriving a statistical analysis of CBP conduct and meets the CBP's burden to justify this withholding. We ask that you produce all of the I-213 forms and I-44 forms, and appeal this withholding.

#### D. Production Schedule

In the interest of avoiding unnecessary litigation, we would be open to discussing an agreed upon production schedule for documents. A production schedule would serve the purpose of both giving the CBP adequate time to compile responsive documents and narrowing any legal issues relating to exemptions that may arise. Any agreed to production schedule would need to include an ability for the requesters to enforce the schedule through a filing with the Court.

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employees who authored government files); *see also Aguirre v. S.E.C.*, 551 F. Supp. 2d 33, 53 (D.D.C. 2008) (quoting *VoteHemp, Inc. v. DEA*, 567 F. Supp. 2d 1, 12 (D.D.C. 2004)).

DyKEMA


February 29, 2016

Page 4

If the CBP is interested in discussing a production schedule with these provisions, please let us know.

Sincerely,

**DYKEMA GOSSETT PLLC**



Samuel C. Damren

Attachments:

1. 5/21/15 FOIA Request
2. 1/12/16 Response to FOIA Request

4842-9056-7982.1  
IDAPHILLIPS, LAUREN - 084145\000999



# EXHIBIT K

Administrative Closure

(May 9, 2016)

U.S. Department of Homeland Security  
Washington, DC 20229



U.S. Customs and  
Border Protection

MAY 09 2016

DIS-3 OT:RR:RDL:FAPL  
CBP-AP-2016-026280 AML

VIA U.S. Mail

Mr. Samuel C. Damren, Esquire  
Dykema Gossett PLLC  
400 Renaissance Center  
Detroit, MI 48243

Re: Remand of Freedom of Information Act Request U.S. Customs and Border  
Protection (CBP) CBP-OBP-2015-036215; Initial response remains pending

Dear Mr. Damren:

This is in reply to your submission, dated March 9, 2016, with which you attempt to appeal the lack of response by U.S. Customs and Border Protection's (CBP) Freedom of Information Act (FOIA) Division, Privacy and Diversity Office (PDO), to "paragraphs C and D" of the American Civil Liberties Union's (ACLU) May 21, 2015, initial request for records on behalf of that organization under case number CBP-OBP-2015-036215. As you are aware, in the May, 2015 initial submission, the ACLU requested to be provided with, among other things, documents related to interior enforcement and documents related to complaints<sup>1</sup> in the Detroit Sector.

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<sup>1</sup> The request provides in relevant part:

C. Documents Related to Interior Enforcement

1. For the Detroit Sector, all records setting forth policies and procedures related to the planning and/or implementation of USBP interior enforcement actions, including raids, patrols, and other contact with members of the public for the purpose of enforcing immigration law. This includes:
  - a. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding the circumstances under which CBP agents may participate in task forces with local law enforcement or provide operational backup to state or local law enforcement, or under which CBP agents may enforce state law.
  - b. Any and all policies, procedures, guidelines, memoranda, instructions, protocols and training materials regarding USBP agents' use of race or ethnicity as a factor in law enforcement decisions.
  - c. All records describing, defining or delimiting USBP's patrol areas, including but not limited to maps of patrols or patrol areas and maps of apprehensions.
  - d. All records containing guidance, including but not limited to that from other federal agencies or components of the Department of Homeland Security, regarding enforcement activities related to specific nationalities, ethnicities, faith communities or groups. This includes any guidance regarding what conditions or activities constitute suspicious activity authorizing or requiring scrutiny or contact by USBP personnel.
  - e. All records regarding when and under what circumstances it is appropriate for USBP to engage in particular methods of law enforcement, including but not limited to pedestrian stops, vehicle stops, stops based on reasonable suspicion or consent, searches authorized by court-issued warrants or based on consent.

Upon inquiry, we were informed by the FOIA Division and the Border Patrol that the response to the initial request remains ongoing and is subject to discussions regarding the additional releases of information and the breadth of the information requested.

The FOIA provides that a requester shall be deemed to have exhausted its administrative remedies if the agency fails to comply with the time limits established by the statute. See 5 U.S.C. § 552 (a)(6)(C)(i)<sup>2</sup>. This means that a requester may proceed directly to district court if an agency fails to respond to an initial request within the time period prescribed by the FOIA.

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination that an agency makes on the requester's initial request. See 5 U.S.C. § 552 (a)(6)(A). Under Department of Homeland Security (DHS) regulations, adverse determinations include denials of requests for records in full or in part, "no records" responses, denials of requests for fee waivers and denials of requests for expedited processing. See 6 CFR 5.6(c)<sup>3</sup>. We note that the definition of adverse determinations does not explicitly include failure to timely respond.

The administrative appeal process is important to agencies and requesters because the appeal process provides an agency with an opportunity to review the initial action taken in response to an initial request to determine whether corrective steps are necessary.

- 
2. All records, including emails, relating to policies and procedures for collaboration between USBP and state or local law enforcement agencies in the Detroit Sector on the following issues:
    - a. Operational backup or support provided by USBP personnel to state or local law enforcement agencies;
    - b. Multi-jurisdictional task force activities that include USBP personnel;
    - c. The investigation of the immigration status of crime victims or witnesses;
    - d. Racial or ethnic profiling and/or racial or ethnic profiling concerns.
  3. For the Detroit Sector, all records that contain any information regarding arrest quotas, targets, goals and expectations that USBP or its personnel were required to meet from fiscal year 2008 to the present.
  4. Performance review standards for USBP and its personnel from fiscal year 2008 to the present.

#### D. Documents Related to Complaints

1. Any records within the possession of the CBP concerning complaints received and/or investigated by DHS, any DHS subcomponents, including CBP internal affairs, the Office for Civil Rights and Civil Liberties (CRCL), Office of Inspector General (OIG); Office of Professional Responsibility (OPR) and internal affairs against CBP or its agents or employees in the Detroit Sector, including but not limited to:
  - a. Complaints alleging misconduct with respect to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement;
  - b. Complaints received through any complaint line or email box or through referral from CBP, CRCL, OIG, OPR or any other agency within DHS;
  - c. All disciplinary actions taken in response to any such complaints.

<sup>2</sup> 5 U.S.C. § 552(a)(6)(C)(i) states: Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

<sup>3</sup> 6 CFR 5.6(c) states: Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.

The appeals process allows CBP to review the initial determinations and to correct any mistakes that may have been made at lower levels, thereby obviating unnecessary judicial review. In this case, there is no administrative record to review because, as you are aware, the FOIA Division and Border Patrol are still processing the initial request.

Accordingly, we are administratively closing your appeal because CBP's FOIA Division and the Border Patrol are still actively processing their response to the initial FOIA request. Those offices should advise the ACLU and you of the time they estimate will be required to complete their ongoing response to the request.

As mentioned above, you may immediately challenge FOIA Division's failure to respond to your request in district court. Pursuant to 5 U.S.C. §552(a)(4)(B), you may do so in the U.S. District Court in the district in which you reside or have a principal place of business, or in which the agency records are situated, or in the U.S. District Court for the District of Columbia.

Alternatively, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You can contact OGIS in any of the following ways (see <https://ogis.archives.gov/mediation-program/requesting-assistance.htm>): Email: [ogis@nara.gov](mailto:ogis@nara.gov) or Fax: 202-741-5769 or Mail: Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; or call 202-741-5770.

Sincerely,



Shari Suzuki, Chief  
FOIA Appeals, Policy and Litigation Branch

## EXHIBIT L

Suzuki Letter Regarding Appeal of Expedited Processing and  
FOIA Online System  
(September 30, 2016)



U.S. Customs and  
Border Protection

September 30, 2016

OT: RR: FAPL  
CBP-AP-2016-007866 MBP

Miriam Aukerman  
American Civil Liberties Union of Michigan  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506

Re: Freedom of Information Act Appeal; File Nos. CBP-2015-042176, CBP-OBP-2015-036215

Dear Ms. Aukerman:

This letter responds to the appeal you filed with this office in reference to the handling of the above-referenced case numbers. In a letter dated May 21, 2015, you filed a Freedom of Information Act request on behalf of your organization, the American Civil Liberties Union of Michigan ("ACLU-M"), the Michigan Immigrant Rights Center ("MIRC"), and two individuals affiliated with the University of Arizona seeking various records related to U.S. Customs and Border Protection's ("CBP's") enforcement activities in the Detroit, Buffalo, and Tucson Sectors. That request was assigned File No. CBP-2015-036215. You submitted an identical request via FOIA Online on July 13, 2015, which was automatically assigned File No. CBP-2015-042176. That second submission was subsequently closed in the FOIA Online system as a duplicate of your previous request.

In a letter dated November 19, 2015, you raised three concerns about the treatment of your request. First, you questioned why your FOIA Online account "does not show CBP-OBP-2015-036215 as a pending request, or contain any information about any actions on that file." You asked that "this be immediately corrected so that I can monitor the progress of this request."<sup>1</sup> Second, you appealed the denial of expedited processing related to your request because CBP's decision to deny that request "provides no basis for understanding why our request was denied." Third, you argued that CBP's failure to respond to your request within twenty business days amounted to a constructive denial of your request. As described in more detail below, your appeal questioning the denial of expedited processing is denied, and your request is remanded to FOIA Division for continued processing of any subsequent substantive records located in response to your request.

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<sup>1</sup> On February 26, 2016, you wrote to FOIA Division to express your continued exasperation with the FOIA Online system, after you did not receive notification of FOIA Division's initial interim release related to your request. You noted that your FOIA Online account continued to show no information related to request CBP-OBP-2015-036215, and that the duplicate request that was associated with your account, CBP-2015-042176, was closed as a duplicate.

## **I. CBP's Online FOIA Submission System Does Not Allow Online Tracking of Requests Submitted via Mail.**

Regarding your concern about monitoring progress on your request via FOIA Online, the issue you described is a direct result of the method in which you submitted your request. Any request submitted via FOIA Online using your FOIA Online account is automatically associated and affiliated with your account and offers all of the benefits of the FOIA Online system, including real time tracking of your request. However, a request submitted via mailed letter or fax is not associated with your account. It is manually input into the system by CBP personnel, and, unfortunately, the system does not allow for it to be affiliated with either a new or existing online account, nor does the system allow for an agency employee to subsequently associate the request with a new or existing account.

In this case, CBP-2015-036215, the case file created in response to your initial request, submitted via postal mail, remains open for processing. It is not associated with your FOIA Online account because it was not submitted via FOIA Online. The system prevents CBP or any other entity from being able to associate the request with your account. As a result, you cannot track the request through the system, nor will you ever be able to in the future. Because you filed this appeal in response to the duplicate request you filed via FOIA Online, you will receive this determination through that system. However, all correspondence related to the open request, CBP-2015-036215, including any responsive records released related to the request, must be mailed directly to you via postal mail. We apologize for any continued inconvenience this may cause.

In the future, if you would like the ability to track a request after you submit it, you must submit that request through the FOIA Online system after logging into your FOIA Online account. If you would like to use FOIA Online, please only submit requests once, and only through that medium, so as to avoid a recurrence of the present situation. You should feel confident that the agency has received any request submitted via FOIA Online as you should receive a confirmation e-mail with your submission and it should appear in your account. Subsequent submissions of the same request via e-mail, postal mail, fax, or any other means do little but slow down agency operations.

## **II. The ACLU of Michigan Has Not Demonstrated a Compelling Need for Expedited Processing**

The FOIA allows for expedited processing "in cases in which the person requesting the records demonstrates a compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(ii). A requestor can only establish a "compelling need" where "a failure to obtain requested records... could reasonably be expected to pose an imminent threat to the life or physical safety of an individual" or "with respect to a request made by a person primarily engaged in disseminating information," there exists an "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v); see also 6 C.F.R. § 5.5(d)(1). Although the FOIA invites agencies to identify additional grounds for granting expedited processing, the Department of Homeland Security has not done so. In your initial request, you argued that expedited processing would be appropriate under either the "imminent threat" or "urgency to inform" prongs. Upon review of your arguments, we conclude that your request does not qualify for expedited processing under either.

At the outset, to guide our analysis, we note that “the specified categories for compelling need are intended to be narrowly applied,” *Al-Fayed v. Centr. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001). This is because “unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for its treatment.” *Id.* (quoting H.R. Rep. No. 104-795, at 26 (1996)). It would also open agencies to the paradoxical problem that “prioritizing all requests would effectively prioritize none.” *Id.* As such, expedited processing is reserved for only the rare circumstances in which the statutory definition of compelling need is met, a burden borne by the requester to prove. *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 122 (D.D.C. 2013).

**A. ACLU of Michigan Has Not Identified an Imminent Threat to the Life of Physical Safety of an Individual.**

You first contend that your request qualifies for expedited treatment because there “a failure to obtain requested records on an expedited basis... could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” To support that contention, you note only that “individuals in USBP custody may face continuing, imminent threats to their life or physical safety” given the “volume and persistent nature of alleged abuses” you described elsewhere in your request such as racial profiling and disregard of agency arrest guidelines. We find this explanation insufficient to support an argument that a delay in releasing the records could result in any threat to the life or physical safety of an individual.

Until last week, no court had ever addressed a request for expedited processing on the basis of an imminent threat to an individual’s life or safety. That changed last week, when the District Court for the District of Connecticut concluded that where a requester describes “a problem that could affect the general [impacted] public,” the requester “can only potentially support a case for expedited processing on the grounds of urgent need to inform the public.” *Treatment Action Grp. v. Food and Drug Admin.*, 2016 U.S. Dist. LEXIS 127877 at \*21-22 (D. Conn. Sept. 20, 2016). To support a claim that a delay would result in an imminent threat to an individual’s life or safety, the court suggested that a requester instead must show “danger faced by one specific individual.” *Id.* at \*20.

Ultimately, we find that none of the concerns you raise sufficiently show an imminent threat to the life or physical safety of an individual. The concerns you raise – racial profiling and disregard for agency arrest guidelines – while significant, do not justify expedited processing. There is no imminent physical or terminal threat to a specific individual. The concerns you raise are far closer to the type of generalized threat that, as the District Court of the District of Connecticut concluded, cannot satisfy the terms outlined in the statute.

**B. ACLU of Michigan Is Not “Primarily Engaged in Disseminating Information” Nor Has It Shown an “Urgency” to Inform the Public about a Federal Government Activity.**

Because you have applied for expedited processing under the “urgency to inform the public” understanding of compelling need, you must first prove that you are a “person primarily engaged in disseminating information.” Here, you contend that both ACLU-M and MIRC are persons primarily engaged in disseminating information. The statutory and regulatory standard demands that you be “*primarily* engaged in disseminating information” (emphasis added). “While courts regularly find that ‘reporters and members of the media qualify’ as ‘persons primarily engaged in information



dissemination,' courts 'must be cautious in deeming non-media organizations' as being such persons because the legislative history dictates that compelling need must be narrowly construed." *Treatment Action Grp.*, 2016 U.S. Dist. LEXIS 127877 at \*23 (quoting *Landmark Legal Found. v. Environmental Prot. Agency*, 910 F. Supp. 2d 270, 276 (D.D.C. 2012)). As such, a requester is only "primarily engaged in information dissemination if information dissemination is the primary activity of the organization, to the exclusion of other main activities. *Id.* We will address each of your qualifications individually.

ACLU-M's website boasts that "the ACLU of Michigan was officially established in 1959 to defend our civil liberties." It describes your mission as "realizing the promise of the Bill of Rights for all and expanding the reach of its guarantees through all the tools at our disposal: public education, advocacy, organizing, and litigation." Your request for expedited processing notes that dissemination of information is a "component" of your mission and work and cites to a publication that refers to ACLU's national organization "almost-journalists." Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (March 28, 2014) available at <http://slate.me/1jg5YXx>.<sup>2</sup> MIRC's website also describes its activities. It lists nine different activities in its mission statement, including coalition building, representing clients, and answering questions and providing support to representatives of low-income immigrants.

The interpretation that "primarily" could refer to multiple functions has been rejected by the courts. See *ACLU of N. Cal. v. Dep't of Justice*, 2005 U.S. Dist. LEXIS 3763 at \*41 (N.D. Cal. Mar. 11, 2005). Instead, "[t]he standard of 'primarily engaged' requires that information dissemination by the *main activity* of the requestor." *Landmark*, 910 F. Supp. 2d at 276 (quoting H. R. Rep. No. 104-795, at 26). Otherwise, any "contrary reading of the statutory requirement would allow nearly any organization with a website, newsletter, or other information distribution channel to qualify as primarily engaged in disseminating information." *Id.* (concluding that a group engaged in "both litigation and information dissemination" is not eligible to qualify for expedited processing under the "urgency to inform" prong). Therefore, while it seems clear "that while dissemination of information may be a main activity" of the ACLU-M and MIRC, "there is no showing that it is *the* main activity." *ACLU of N. Cal. v. Dep't of Justice*, 2005 U.S. Dist. LEXIS 3763 at \*41 (emphasis in original).<sup>3</sup>

Even if you did qualify as a person primarily engaged in disseminating information, you have also failed to prove that there is an "urgency" to inform the public about a federal government activity. Although FOIA does not define "urgency," the relevant legislative history provides insight to its meaning. The "standard of 'urgency to inform' requires that the information should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest." See *Al-Fayed*, 254 F.3d at 310 (quoting H.R. Rep. No. 104-795 at 26). Thus, determining whether requestors

<sup>2</sup> We note that we evaluate only the requester's bonafides as being primarily engaged in disseminating information, and do not address the efforts of its parent organization or sister chapters.

<sup>3</sup> We take this occasion to point out an error in your initial request for expedited processing. You claim that "the fact that ACLU meets these criteria has previously been recognized in FOIA litigation between the ACLU and the Department of Justice, citing to *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). We find this to be a mischaracterization of the courts discussion in that decision. Notably, the issue of whether ACLU was "primarily engaged" was not litigated there. The Department of Justice hazily conceded that ACLU's co-plaintiff, the Electronic Privacy Information Center ("EPIC") was primarily engaged in disseminating information. The court noted that the standard is satisfied "as long as one of the plaintiffs qualifies as an entity." It does not address whether ACLU qualifies. Moreover, as noted above, we consider only the engagement of the individual requester in dissemination activities, and not that of its parent or sister organizations.

have demonstrated an “urgency to inform” requires an examination of three factors: “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” *Id.*

We find that you have failed to prove whether the request concerns a matter of current exigency to the American public. To qualify, the records must relate to “a breaking news story that is the subject of intense media interest.” *Treatment Action Grp.*, 2016 U.S. Dist. LEXIS 127877 at \*30. As proof, you pointed to eight news stories published over the course of a year identifying “allegations of abuse, neglect, excessive force, and racial profiling” against CBP. Three of those articles all related to the former assistant commissioner for internal affairs at the agency stepping down from his position.

Although coverage in the local and national media can evidence an exigency to the American public, *Amer. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 32 (D.D.C. 2004), there must be “substantial interest in particular aspect” of the request to warrant expedited processing. *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004). Eight news articles published over the course of a year falls well short of proving the necessary “substantial interest” to remove your request from the ordinary processing queue for expedited treatment. *Compare Gerstein v. Centr. Intelligence Agency*, 2006 U.S. Dist. LEXIS 89847, 18-19 (N.D. Cal. Nov. 29, 2006) (finding an exigency where requester identified 997 articles in previous 90 days). A Google News search produced more than 2,370 articles printed about Customs and Border Protection in the last week alone. If eight news articles published over the course of a year about an entire branch of the agency was enough to justify expedited processing, the agency would be forced to grant expedited processing for nearly all of the request it receives, thereby “effectively prioritize[ing] none.” *Al-Fayed*, 254 F.3d at 310.

We also struggle to recognize the nexus between some of the records you requested (for example, daily apprehension logs for three specific sectors or records of individual stops and detentions in the Detroit Sector) and the asserted exigency. On the contrary, we find that “there is no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of” your request. *Al-Fayed*, 254 F.3d at 311. See also *Elec. Privacy Info. Ctr.* 355 F. Supp. 2d at 102 (D.D.C. 2004) (“The case law makes it clear that only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited treatment... The fact that Plaintiff has provided evidence that there is some media interest in... an umbrella issue does not satisfy the requirement that Plaintiff demonstrate interest in the specific subject of Plaintiff’s FOIA request”).

We also find that your request for expedited treatment fails the second consideration of this analysis, whether the consequences of delaying a response would compromise a significant recognized interest. Specifically, we find that you “have failed to identify an imminent action indicating that the requested information will ‘not retain its value if procured through the normal FOIA channels.’” *Long v. Dep’t of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006). Your request references a nebulous “sensitive debate about immigration reform,” but does not pinpoint a specific vote or specific pending legislation that necessitate the immediate release of the requested records.

This stands in stark contradiction of the instances where courts have identified an imminent activity that would obviate the need for the requested records if the agency processed them according to standard timelines: public debate over the renewal of the USA PATRIOT Act, *Amer. Civil Liberties Union v.*

*Dep't of Justice*, 321 F. Supp. 2d at 32, a breaking news story about domestic surveillance of anti-war protesters, *ACLU of N. Cal. v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 36888 (N.D. Cal. 2006), an active debate over the reauthorization of certain Voting Rights Act provisions, *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005). Here, there is no pending action that would “render any disclosure little more than a historical footnote,” *Gerstein*, 2006 U.S. Dist. LEXIS 89847 at 18-19, just an “ongoing” debate.

Having failed to prove that you are primarily engaged in disseminating information and subsequently failing both the first and second criteria needed to demonstrate an urgency to inform the public, and thus a compelling interest, your request for expedited processing is denied.

### **III. Your Arguments Suggesting the Constructive Denial of Your Request Are Moot**

Shortly after you filed this appeal, FOIA Division issued an interim response related to your initial request totaling 4,624 pages on January 12, 2016. As such, your contention that the agency’s failure to respond to your request amounted to a constructive denial of it, is moot.

### **IV. Right to Judicial Review and Other Remedies**

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §552(a)(4)(B) in the United States District Court in the District in which you reside, in the District where the agency records are situated, or in the United States District Court for the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call 1-877-684-6448.

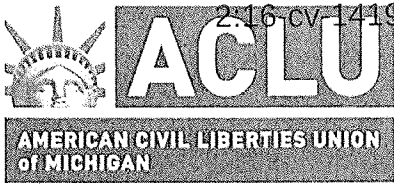
Sincerely,

*Shari Suzuki*

Shari Suzuki, Chief  
FOIA Appeals, Policy and Litigation Branch

## EXHIBIT M

E-mail from CBPFOIA@cbp.dhs.gov to Miriam Aukerman  
(October 21, 2016)



State Headquarters  
2966 Woodward Avenue  
Detroit, MI 48201  
Phone 313.578.6800  
Fax 313.578.6811  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

Lansing Office  
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Lansing, MI 48933  
Phone 517.372.8503  
Fax 517.372.5121  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

Michigan Regional Office  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
Phone 616.301.0930  
Fax 616.301.0640  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

February 26, 2016

VIA: CERTIFIED MAIL, FOIA ONLINE SYSTEM,  
AND ELECTRONIC MAIL

Sabrina Burroughs, FOIA Officer/Public Liaison  
Patrick Howard, Branch Chief  
U.S. Customs and Border Protection, FOIA Division  
Privacy and Diversity Office  
90 K Street NE, 9<sup>th</sup> Floor  
Washington, D.C. 20229-1181  
[cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov)  
[PATRICK.A.HOWARD@CBP.DHS.GOV](mailto:PATRICK.A.HOWARD@CBP.DHS.GOV)

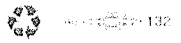
**Re: CBP-2015-036215, CBP-OBP-2015-036215, CBP-AP-2016-007866,  
CBP-AP-2015-042176**

Dear Ms. Burroughs and Mr. Howard:

We have repeatedly brought to your attention the problems with the FOIA Online system in this case. Unfortunately, those problems have not been addressed. Accordingly, we are writing to notify you that we will no longer accept service of correspondence or notification of document productions through the FOIA Online system. We will assume that you have not sent correspondence or produced documents unless correspondence or document notifications are sent by postal mail or via direct email communication. For the purposes of any FOIA deadlines, we will assume that the triggering date is the date of *actual receipt* by us, rather than the date of the communication or document release through the FOIA Online system.

This FOIA was originally submitted on May 21, 2015 by both certified mail and electronic mail to [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). When no response was received, we resubmitted the FOIA on July 13, 2015 via the FOIA Online system. On October 21, 2015, we received a notification that the FOIA request CBP- 2015-042176 was closed as a duplicate of FOIA request CBP-2015-036215. On October 26, 2015, Miriam Aukerman wrote to you explaining that her on-line account shows no information about CBP-2015-036215. She asked that her on-line account be updated to include that case so she could track its progress. She received no response.

On November 19, 2015, Ms. Aukerman submitted an appeal letter in which she explained that her on-line account did not show CBP-OBP-2015-036215. (A notice dated October 30, 2015 indicated that the tracking number was changed from CBP-2015-036215 to CBP-OBP-2015-



036215.) She asked that this be immediately corrected to that she could monitor the progress of the FOIA. Again, she received no response.

On January 12, 2016, Ms. Aukerman received an email from Patrick Howard stating that an initial response had just been sent to her concerning FOIA request 2015-036215, and asking her to review the agency's suggestions concerning a particular part of the FOIA. She had not, however, received any documents or correspondence from the FOIA Online system. She responded to Mr. Howard on January 13, 2016, explaining that she had not received any notifications when documents are added to the FOIA-Online system and requesting clarification on whether this is a technical problem. She also explained once again that FOIA 2015-036215 does not show up in her FOIA Online account, and therefore she cannot access any correspondence that is sent.

Mr. Howard responded that request 2015-036215 "is not attached to your account, for some reason." Mr. Howard indicated that he would send a notification to CBP's contractor to have her account synced to this FOIA. Mr. Howard also suggested that an email regarding the interim release should have arrived 5-10 minutes before his January 12 email, and that Ms. Aukerman should check her junk folder. Ms. Aukerman responded to Mr. Howard that she would speak with the ACLU's IT contractor to determine if incoming emails from CBP were being blocked by spam filters. Ms. Aukerman also asked Mr. Howard to follow up with CBP's contractor, because she also was not receiving any emails from the FOIA Online system for other pending FOIA requests.

On February 1, 2016, Ms. Aukerman sent an email to Mr. Howard indicating that the ACLU's IT contractor had determined that no emails from CBP had been blocked by spam filters. Ms. Aukerman asked again that Mr. Howard contact CBP's contractor to remedy the issue. She received no response.

On February 5, 2016, Ms. Aukerman wrote to Mr. Howard again, indicating that CBP's contractor has still not synced case 2015-036215 with her account. She received no response.

In short, we have repeatedly brought the problems with the FOIA Online system to your attention, and they have not been remedied. Because case 2015-036215 is still not linked to Ms. Aukerman's account, and because the FOIA Online system is not sending notifications when correspondence is issued or documents are released, we have no way to know when there is activity in this case. We cannot respond to or appeal correspondence we do not receive, nor can we review the adequacy of document productions we do not see.

Accordingly, we will no longer accept service of any correspondence or notices generated by the FOIA Online system, and will not accept the date of such correspondence or notices as triggering deadlines under FOIA. All correspondence must be sent to us either by postal mail or direct email communication. Given the volume of documents requested, we ask that all document production be done electronically, with documents provided in their native format.

All communications must be sent to the following three attorneys:

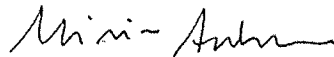
Miriam Aukerman  
American Civil Liberties Union Fund of Michigan  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
616-301-0930  
[maukerman@aclumich.org](mailto:maukerman@aclumich.org)

Samuel Damren  
Dykema Gossett PLLC  
400 Renaissance Ctr  
Detroit, MI 48243  
313-568-6800  
[sdamren@dykema.com](mailto:sdamren@dykema.com)

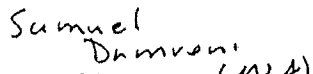
Lauren Phillips  
Dykema Gossett PLLC  
400 Renaissance Ctr  
Detroit, MI 48243  
313-568-5416  
[lmphillips@dykema.com](mailto:lmphillips@dykema.com)

Finally, we ask again that that you rectify the problems with the FOIA Online system and sync Ms. Aukerman's account with this FOIA request.

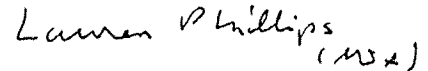
Sincerely,



Miriam Aukerman  
ACLU Fund of Michigan



Samuel Damren (MSA)  
Dykema Gossett



Lauren Phillips (MSA)  
Dykema Gossett

Encl. Aukerman Correspondence (10/26/2015)  
Appeal Letter (11/19/2015)  
Aukerman-Howard Correspondence (1/12/2016-2/5/2016)

**Miriam Aukerman**

---

**From:** Miriam Aukerman  
**Sent:** Monday, October 26, 2015 4:38 PM  
**To:** 'CBPFOIA@cbp.dhs.gov'  
**Cc:** 'andrew.a.peth@cbp.dhs.gov'; Julia Henshaw  
**Subject:** RE: Final Disposition, Request CBP-2015-042176

Dear FOIA Officer,

I have received the notification below indicating that my FOIA request was consolidated with an earlier request, namely request no CBP-2015-036215. As indicated at the time I submitted CBP-2015-042176, that FOIA was originally submitted on 5/21/2015. However, because I received no response, I resubmitted the FOIA on 7/13/2015.

My on-line account shows no information about the status of my original request. Nor have I ever received any correspondence – not even so much as a case number assignment – regarding my initial submission. This latest correspondence suggests that perhaps my 5/21/2015 request was assigned case number CBP-2015-036215. Could you please confirm that. Could you also please update the on-line account to reflect submission of CBP-2015-036215, so that I can track the progress of that FOIA.

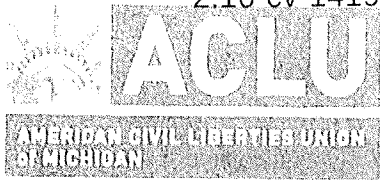
Thank you for your assistance.

Miriam Aukerman  
Staff Attorney  
American Civil Liberties Union of Michigan

**From:** [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [mailto:CBPFOIA@cbp.dhs.gov]  
**Sent:** Wednesday, October 21, 2015 10:40 AM  
**To:** Miriam Aukerman  
**Subject:** Final Disposition, Request CBP-2015-042176

This FOIA request has been closed as it is a duplicate of an earlier FOIA request that you submitted (CBP-2015-036215). Your earlier FOIA request will be processed in the order it was received.





300  
 2700 W. Grand Blvd.  
 Detroit, MI 48208  
 Phone: 313/962-1400  
 Fax: 313/962-1401  
 Email: [info@aclu-mi.org](mailto:info@aclu-mi.org)  
[www.aclu-mi.org](http://www.aclu-mi.org)

Legislative Office  
 1000 W. Grand Blvd.  
 Detroit, MI 48208  
 Phone: 313/962-1400  
 Fax: 313/962-1401  
 Email: [legislative@aclu-mi.org](mailto:legislative@aclu-mi.org)  
[www.aclu-mi.org](http://www.aclu-mi.org)

West Michigan Department of Justice  
 1000 W. Grand Blvd.  
 Detroit, MI 48208  
 Phone: 313/962-1400  
 Fax: 313/962-1401  
 Email: [westmichigan@aclu-mi.org](mailto:westmichigan@aclu-mi.org)  
[www.aclu-mi.org](http://www.aclu-mi.org)

November 19, 2015

*Via On-line Submission and Certified Mail*

Assistant Commissioner  
 Office of International Trade  
 Regulations & Rulings  
 U.S. Customs & Border Protection  
 799 9<sup>th</sup> Street NW (5<sup>th</sup> Floor)  
 Washington, DC 20229-1179

FOIA Office/Public Liaison  
 U.S. Customs and Border Protection  
 90 K Street NE, 9<sup>th</sup> Floor  
 Washington, D.C. 20229-1181

Re: Appeal in CBP-2015-042176, CBP-OPB-2015-036215

Dear Assistant Commissioner and Public Liaison:

I am writing to appeal the handling of the above-captioned Freedom of Information Act request, submitted May 21, 2015.

First, I request clarification on how this case is being handled. The on-line system shows that CBP-2015-042176 has been closed as a duplicate, and that the fee waiver request has been determined "not applicable", apparently based on the fact that the request is considered a duplicate of CBP-OBP-2015-036215. However, my on-line account does not show CBP-OBP-2015-036215, or contain any information about any actions on that file. On October 26, 2015, I emailed [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) regarding this issue. However, to date my on-line account still does not show CBP-OBP-2015-036215. I would ask that this be immediately corrected so that I can monitor the progress of this request.

Second, I am following up on my letter of October 14, 2015, appealing the denial of expedited processing in CBP-2015-042176. The email I received denying expedited processing in CBP-2015-042176 contained no information regarding appeal rights and did not specify to whom an appeal should be sent. I originally addressed my appeal to the Assistant Commissioner. However, as I have received no response, I am, with this letter, resubmitting that appeal both to the Assistant Commissioner and to the Public Liaison.

As indicated in my prior letter, the only information provided in the summary rejection of our request for expedited processing was: "Does not meet requirements per DHS

Regulations.” Because this bald statement provides no basis for understanding why our request was denied, we appeal. Once the agency provides a basis for the denial of expedited processing, I can address any justifications given. But it is impossible to respond on the merits to a denial where the agency has failed to articulate a reason for the denial.

Finally, as of the date of this letter, the government has not responded to the Freedom of Information Act Request, originally submitted on May 21, 2015, and resubmitted (due to lack of response) on July 13, 2015. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, requires that all federal agencies respond to any request for records within 20 business days, U.S.C. § 552(a)(6)(A)(i). That 20-day period has long since elapsed.

To date, we have received no substantive response to the FOIA request. This failure to respond can be construed as a constructive denial, 5 U.S.C. § 552(a)(6)(A). Accordingly, we hereby appeal DHS’s failure to make a timely determination regarding the FOIA request.

Sincerely,



Miriam Aukerman  
Staff Attorney

cc: Geoffrey Boyce  
Dr. Elizabeth Oglesby  
Susan Reed

**Miriam Aukerman**

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**From:** CBPFOIA@cbp.dhs.gov  
**Sent:** Thursday, November 19, 2015 10:25 AM  
**To:** Miriam Aukerman  
**Subject:** FOIA Appeal CBP-AP-2016-007866 Submitted

This message is to notify you of a new appeal submission to the FOIAonline application. Appeal information is as follows:

- Appeal Tracking Number: CBP-AP-2016-007866
- Request Tracking Number: CBP-2015-042176
- Requester Name: Miriam Aukerman
- Date Submitted: 11/19/2015
- Appeal Status: Submitted
- Description: Please note that this appeal also relates to CBP-OBP-2015-036215, which apparently is the number currently assigned to this FOIA request. However, the on-line system does not show CBP-OBP-2015-036215 as one of my FOIA requests, and it does not appear that I can submit an on-line appeal under that case number. A copy of this appeal is also being sent by certified mail.

As detailed in the attached letter, this appeal concerns the constructive denial of documents in CBP-2015-042176 and CBP-OBP-2015-036215, as well as the denial of expedited processing in CBP-2015-042176.

**Miriam Aukerman**

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**From:** Miriam Aukerman  
**Sent:** Friday, February 05, 2016 6:49 PM  
**To:** 'HOWARD, PATRICK A'  
**Cc:** Julia Henshaw  
**Subject:** RE: Your FOIA Request 2015-036215

Dear Mr. Howard,

I am writing to follow up on the technical issues. You indicated in your January 13<sup>th</sup> email that you would have your contractor sync case 2015-036215 with my account. However, that appears not to have happened yet. I remain concerned that I will not receive emails related to this or my other FOIAs unless the technical problems are resolved.

You also indicated that you would provide us the documents in an excel format. To date we have not received them. Could you please follow up to ensure that we receive those promptly.

Thank you for your assistance.

Sincerely,

Miriam Aukerman  
Staff Attorney  
American Civil Liberties Union of Michigan

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**From:** Miriam Aukerman  
**Sent:** Monday, February 01, 2016 11:40 AM  
**To:** 'HOWARD, PATRICK A'  
**Cc:** Julia Henshaw  
**Subject:** RE: Your FOIA Request 2015-036215

Dear Mr. Howard,

I wanted to let you know that I contacted our technical support regarding the fact that I have not been receiving emails sent from the @cbp.dhs.gov address. Technical support informed me at follows:

“There are no emails from any address at the @cbp.dhs.gov domain in the spam filter. I have gone ahead and whitelisted the domain for future problem prevention.”

It thus appears that, for whatever reason, your system is not sending emails to my account. Could you please pass this message on to your technical people to ensure that they fix whatever issue is preventing us from receiving these emails. Could you also ask them to send a test message, so that we can check whether the system is functioning. Please have them contact our paralegal, Julia Henshaw, [jhenshaw@aclumich.org](mailto:jhenshaw@aclumich.org) or 616 301 0930, to resolve the issue.

Thank you for your assistance.

Miriam Aukerman

Staff Attorney  
American Civil Liberties Union of Michigan

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**From:** HOWARD, PATRICK A [mailto:PATRICK.A.HOWARD@CBP.DHS.GOV]  
**Sent:** Wednesday, January 13, 2016 9:38 AM  
**To:** Miriam Aukerman  
**Cc:** Julia Henshaw  
**Subject:** RE: Your FOIA Request 2015-036215

Ms. Aukerman,

Regarding the first two portions of your e-mail, this request is not attached to your account, for some reason. I checked other requests you have filed, and the e-mail address is consistent, so this should have been picked up. I'll send an e-mail to our contractor to have them sync it for you. This would explain why you were not receiving notifications and why the request is not showing up on your dashboard.

Regarding part three, you were able to pull up the documents because they were marked for public viewing. For quick background, our office has received over 140,000 FOIA requests in the past three years, and we have operated under an unfortunately large backlog for some time. We have made a lot of progress in the past 12-18 months and gotten our backlog under 3,000 requests. One benefit to this, besides faster response times, is that we've been able to start evaluating this sort of information for inclusion in our online reading room, making records publicly viewable, etc. This is why you were able to locate the records. The correspondence that was sent is marked "Requester Only."

All of this should have been sent to you in our Interim Release. It would have come from the "CBP FOIA" mailbox, and should have had the letter and PDF's attached, maybe 5-10 minutes before my follow up e-mail. Did you not receive this, or perhaps it was routed to your junk mail folder? Regardless, I have attached the correspondence to this e-mail so you don't need to search for it.

As far as the Excel portion goes, the standard output from our office is PDF, but our appeals staff, who you have worked with before, will send documents in Excel. Rather than having you go through the process of filing an appeal, I'll send the Excel document to them and have one of them send it to you.

Please let me know when you have had a chance to review our first response, and if we can pursue a compromise on section B of your request.

Thank you

Patrick A. Howard  
Branch Chief, FOIA Division  
Privacy and Diversity Office  
Office of the Commissioner

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**From:** Miriam Aukerman [mailto:[maukerman@aclumich.org](mailto:maukerman@aclumich.org)]  
**Sent:** Wednesday, January 13, 2016 9:11 AM  
**To:** HOWARD, PATRICK A  
**Cc:** Julia Henshaw  
**Subject:** RE: Your FOIA Request 2015-036215

Please see the corrected email below.

Dear Mr. Howard,

Thank you again for bringing this to my attention. Although I have not yet been able to review the substance of what you have sent, I had several administrative questions.

First, I do not receive any electronic notifications when documents are added to my requests on the FOIA-Online system. In the past I sometimes received such alerts. But I no longer do. I thus do not know when there is correspondence or new documents, unless, as in this case, you notify me. If this is a technical problem, please let me know whom I should contact to get it resolved. I obviously do not want to miss correspondence or documents because I am unaware that they have been uploaded into the system.

Second, FOIA Request 2015-036215 does not show under the list of my FOIAs when I click on “ View My FOIA Requests.” Is there a reason it does not show up there, or is that an error? Can you please contact the appropriate person to ensure that this request shows up on my list of FOIAs. Or is there something I need to do on the site to make this happen?

Third, when I search for FOIA Request 2015-036215 under the general search function, I can pull up documents that were released. I see four documents, and a FOIA log. But I cannot see any correspondence. I assume that is because this function is for the general public, not the actual document requester. Your email refers to “our proposition concerning part B of your request.” However, I cannot see any document that discusses this. I assume there is some sort of cover letter to the released documents that I am unable to review. Can you please provide a copy of whatever cover letter was sent. If there are more than four pdfs of material that were released, please send those as well. I am concerned that if I cannot see correspondence, I may also not be able to see other released documents.

Finally, was unable to open the spreadsheets in excel. Can you advise how I can get them in excel format?

Thank you for your assistance. I look forward to responding on the substantive issues once I have your complete correspondence.

Sincerely,

Miriam Aukerman  
Staff Attorney  
American Civil Liberties Union of Michigan

Miriam Aukerman  
West Michigan Regional Staff Attorney  
American Civil Liberties Union of Michigan

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**From:** Miriam Aukerman  
**Sent:** Wednesday, January 13, 2016 8:54 AM  
**To:** 'HOWARD, PATRICK A'  
**Cc:** Julia Henshaw  
**Subject:** RE: Your FOIA Request 2015-036215

Dear Mr. Branch,

Thank you again for bringing this to my attention. Although I have not yet been able to review the substance of what you have sent, I had several administrative questions.

First, I do not receive any electronic notifications when documents are added to my requests on the FOIA-Online system. In the past I sometimes received such alerts. But I no longer do. I thus do not know when there is correspondence or new documents, unless, as in this case, you notify me. If this is a technical problem, please let me know whom I should contact to get it resolved. I obviously do not want to miss correspondence or documents because I am unaware that they have been uploaded into the system.

Second, FOIA Request 2015-036215 does not show under the list of my FOIAs when I click on "View My FOIA Requests." Is there a reason it does not show up there, or is that an error? Can you please contact the appropriate person to ensure that this request shows up on my list of FOIAs. Or is there something I need to do on the site to make this happen?

Third, when I search for FOIA Request 2015-036215 under the general search function, I can pull up documents that were released. I see four documents, and a FOIA log. But I cannot see any correspondence. I assume that is because this function is for the general public, not the actual document requester. Your email refers to "our proposition concerning part B of your request." However, I cannot see any document that discusses this. I assume there is some sort of cover letter to the released documents that I am unable to review. Can you please provide a copy of whatever cover letter was sent. If there are more than four pdfs of material that were released, please send those as well. I am concerned that if I cannot see correspondence, I may also not be able to see other released documents.

Finally, was unable to open the spreadsheets in excel. Can you advise how I can get them in excel format?

Thank you for your assistance. I look forward to responding on the substantive issues once I have your complete correspondence.

Sincerely,

Miriam Aukerman  
Staff Attorney  
American Civil Liberties Union of Michigan

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**From:** HOWARD, PATRICK A [<mailto:PATRICK.A.HOWARD@CBP.DHS.GOV>]  
**Sent:** Tuesday, January 12, 2016 10:55 AM  
**To:** Miriam Aukerman  
**Subject:** Your FOIA Request 2015-036215

Ms. Aukerman,

An initial response was just sent to you concerning FOIA request 2015-036215. We are continuing to work on other sections of the request.

When you have a moment, please review our proposition concerning part B of your request to see if we can pursue a similar arrangement as was done on a previous FOIA with another requester.

Thank you

Patrick A. Howard, Branch Chief  
U.S. Customs and Border Protection, FOIA Division

Privacy and Diversity Office  
Office of the Commissioner



## EXHIBIT N

E-mail from [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) to Miriam Aukerman  
(October 30, 2015)

## Elvira Hernandez

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**From:** Elvira Hernandez  
**Sent:** Thursday, October 13, 2016 12:13 PM  
**To:** Elvira Hernandez  
**Subject:** FW: FOIA Request Tracking Number Change for Request CBP-OBP-2015-036215 (to CBP-2015-036215)

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**From:** [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [CBPFOIA@cbp.dhs.gov]  
**Sent:** Friday, October 30, 2015 8:09 AM  
**To:** Miriam Aukerman  
**Subject:** FOIA Request Tracking Number Change for Request CBP-OBP-2015-036215 (to CBP-2015-036215)

The FOIA request CBP-OBP-2015-036215 has had its Tracking Number changed to CBP-2015-036215. This is normally due to the request being transferred to another agency (for example, EPA to Dept. of Commerce) or to a sub-agency to process it. Additional details for this request are as follows:

- \* Old Tracking Number: CBP-OBP-2015-036215
- \* New Tracking Number: CBP-2015-036215
- \* Requester Name: Miriam Aukerman
- \* Date Submitted: 06/02/2015
- \* Long Description: requesting documents relating to the enforcement activities of the U.S. Border Patrol and/or its officers and/or staff for FY 2012 through FY 2014 from the Detroit sector

## EXHIBIT O

Aukerman E-mail Seeking Clarification on Case Numbers  
(October 26, 2015)

**Miriam Aukerman**

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**From:** Miriam Aukerman  
**Sent:** Monday, October 26, 2015 4:38 PM  
**To:** 'CBPFOIA@cbp.dhs.gov'  
**Cc:** 'andrew.a.peth@cbp.dhs.gov'; Julia Henshaw  
**Subject:** RE: Final Disposition, Request CBP-2015-042176

Dear FOIA Officer,

I have received the notification below indicating that my FOIA request was consolidated with an earlier request, namely request no CBP-2015-036215. As indicated at the time I submitted CBP-2015-042176, that FOIA was originally submitted on 5/21/2015. However, because I received no response, I resubmitted the FOIA on 7/13/2015.

My on-line account shows no information about the status of my original request. Nor have I ever received any correspondence – not even so much as a case number assignment – regarding my initial submission. This latest correspondence suggests that perhaps my 5/21/2015 request was assigned case number CBP-2015-036215. Could you please confirm that. Could you also please update the on-line account to reflect submission of CBP-2015-036215, so that I can track the progress of that FOIA.

Thank you for your assistance.

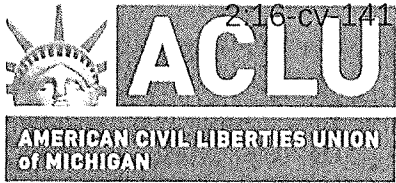
Miriam Aukerman  
Staff Attorney  
American Civil Liberties Union of Michigan

**From:** [CBPFOIA@cbp.dhs.gov](mailto:CBPFOIA@cbp.dhs.gov) [<mailto:CBPFOIA@cbp.dhs.gov>]  
**Sent:** Wednesday, October 21, 2015 10:40 AM  
**To:** Miriam Aukerman  
**Subject:** Final Disposition, Request CBP-2015-042176

This FOIA request has been closed as it is a duplicate of an earlier FOIA request that you submitted (CBP-2015-036215). Your earlier FOIA request will be processed in the order it was received.

## EXHIBIT P

Plaintiffs' Letter Re Problems with FOIA Online Systems  
(February 26, 2016)



2966 Woodward Avenue  
Detroit, MI 48201  
Phone 313.578.6800  
Fax 313.578.6811  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

115 West Allegan Street  
Lansing, MI 48933  
Phone 517.372.8503  
Fax 517.372.5121  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
Phone 616.301.0930  
Fax 616.301.0640  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

February 26, 2016

VIA: CERTIFIED MAIL, FOIA ONLINE SYSTEM,  
AND ELECTRONIC MAIL

Sabrina Burroughs, FOIA Officer/Public Liaison  
Patrick Howard, Branch Chief  
U.S. Customs and Border Protection, FOIA Division  
Privacy and Diversity Office  
90 K Street NE, 9<sup>th</sup> Floor  
Washington, D.C. 20229-1181  
[cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov)  
[PATRICK.A.HOWARD@CBP.DHS.GOV](mailto:PATRICK.A.HOWARD@CBP.DHS.GOV)

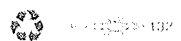
**Re: CBP-2015-036215, CBP-OBP-2015-036215, CBP-AP-2016-007866,  
CBP-AP-2015-042176**

Dear Ms. Burroughs and Mr. Howard:

We have repeatedly brought to your attention the problems with the FOIA Online system in this case. Unfortunately, those problems have not been addressed. Accordingly, we are writing to notify you that we will no longer accept service of correspondence or notification of document productions through the FOIA Online system. We will assume that you have not sent correspondence or produced documents unless correspondence or document notifications are sent by postal mail or via direct email communication. For the purposes of any FOIA deadlines, we will assume that the triggering date is the date of *actual receipt* by us, rather than the date of the communication or document release through the FOIA Online system.

This FOIA was originally submitted on May 21, 2015 by both certified mail and electronic mail to [cbpfoia@dhs.gov](mailto:cbpfoia@dhs.gov). When no response was received, we resubmitted the FOIA on July 13, 2015 via the FOIA Online system. On October 21, 2015, we received a notification that the FOIA request CBP-2015-042176 was closed as a duplicate of FOIA request CBP-2015-036215. On October 26, 2015, Miriam Aukerman wrote to you explaining that her on-line account shows no information about CBP-2015-036215. She asked that her on-line account be updated to include that case so she could track its progress. She received no response.

On November 19, 2015, Ms. Aukerman submitted an appeal letter in which she explained that her on-line account did not show CBP-OBP-2015-036215. (A notice dated October 30, 2015 indicated that the tracking number was changed from CBP-2015-036215 to CBP-OBP-2015-



036215.) She asked that this be immediately corrected so that she could monitor the progress of the FOIA. Again, she received no response.

On January 12, 2016, Ms. Aukerman received an email from Patrick Howard stating that an initial response had just been sent to her concerning FOIA request 2015-036215, and asking her to review the agency's suggestions concerning a particular part of the FOIA. She had not, however, received any documents or correspondence from the FOIA Online system. She responded to Mr. Howard on January 13, 2016, explaining that she had not received any notifications when documents are added to the FOIA-Online system and requesting clarification on whether this is a technical problem. She also explained once again that FOIA 2015-036215 does not show up in her FOIA Online account, and therefore she cannot access any correspondence that is sent.

Mr. Howard responded that request 2015-036215 "is not attached to your account, for some reason." Mr. Howard indicated that he would send a notification to CBP's contractor to have her account synced to this FOIA. Mr. Howard also suggested that an email regarding the interim release should have arrived 5-10 minutes before his January 12 email, and that Ms. Aukerman should check her junk folder. Ms. Aukerman responded to Mr. Howard that she would speak with the ACLU's IT contractor to determine if incoming emails from CBP were being blocked by spam filters. Ms. Aukerman also asked Mr. Howard to follow up with CBP's contractor, because she also was not receiving any emails from the FOIA Online system for other pending FOIA requests.

On February 1, 2016, Ms. Aukerman sent an email to Mr. Howard indicating that the ACLU's IT contractor had determined that no emails from CBP had been blocked by spam filters. Ms. Aukerman asked again that Mr. Howard contact CBP's contractor to remedy the issue. She received no response.

On February 5, 2016, Ms. Aukerman wrote to Mr. Howard again, indicating that CBP's contractor has still not synced case 2015-036215 with her account. She received no response.

In short, we have repeatedly brought the problems with the FOIA Online system to your attention, and they have not been remedied. Because case 2015-036215 is still not linked to Ms. Aukerman's account, and because the FOIA Online system is not sending notifications when correspondence is issued or documents are released, we have no way to know when there is activity in this case. We cannot respond to or appeal correspondence we do not receive, nor can we review the adequacy of document productions we do not see.

Accordingly, we will no longer accept service of any correspondence or notices generated by the FOIA Online system, and will not accept the date of such correspondence or notices as triggering deadlines under FOIA. All correspondence must be sent to us either by postal mail or direct email communication. Given the volume of documents requested, we ask that all document production be done electronically, with documents provided in their native format.

All communications must be sent to the following three attorneys:

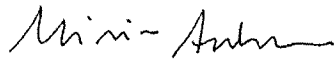
Miriam Aukerman  
American Civil Liberties Union Fund of Michigan  
1514 Wealthy SE, Suite 242  
Grand Rapids, MI 49506  
616-301-0930  
[maukerman@aclumich.org](mailto:maukerman@aclumich.org)

Samuel Damren  
Dykema Gossett PLLC  
400 Renaissance Ctr  
Detroit, MI 48243  
313-568-6800  
[sdamren@dykema.com](mailto:sdamren@dykema.com)

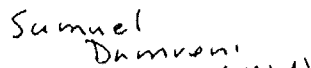
Lauren Phillips  
Dykema Gossett PLLC  
400 Renaissance Ctr  
Detroit, MI 48243  
313-568-5416  
[lmphillips@dykema.com](mailto:lmphillips@dykema.com)

Finally, we ask again that that you rectify the problems with the FOIA Online system and sync Ms. Aukerman's account with this FOIA request.

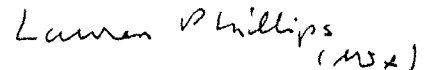
Sincerely,



Miriam Aukerman  
ACLU Fund of Michigan



Samuel Damren (MSX)  
Dykema Gossett



Lauren Phillips (MSX)  
Dykema Gossett

Encl. Aukerman Correspondence (10/26/2015)  
Appeal Letter (11/19/2015)  
Aukerman-Howard Correspondence (1/12/2016-2/5/2016)