



July 11, 2023

Sent via SecureRelease Portal:

U.S. Customs and Border Protection  
90 K ST NE MS 1181  
Washington, DC 20229

Re: Freedom of Information Act Request for Records Regarding  
CBP's Processing of Asylum-Seekers at Southwest Ports of Entry

Dear Freedom of Information Officer:

The American Immigration Council (the "Council") and the Center for Gender and Refugee Studies ("CGRS") submit this request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain information regarding U.S. Customs and Border Protection ("CBP") implementation of new border management measures that require individuals seeking processing at certain southwest ports of entry to apply for an inspection appointment using CBP's smartphone mobile application, CBP One. Requestors seek a fee waiver of any fee imposed by the agency because the records sought will contribute to the public's understanding of CBP operations and release of the information is not in Requestor's commercial interest.

#### I. REQUEST FOR INFORMATION

Requestors seek records<sup>1</sup> prepared, received, transmitted, collected or maintained by CBP as described below.

1. Records dating from December 2022 until the present relating to guidance, guidelines, procedures, policies or protocols that address how staff from CBP's Office of Field Operations ("OFO") manage undocumented noncitizens who approach Class A ports of entry along the U.S.-Mexico border (hereinafter "Class A POEs") seeking inspection, including but not limited to, individuals who approach ports of entry without a CBP One appointment.
2. Records dating from December 2022 until the present relating to the practice or use of metering noncitizens at Class A POEs.

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<sup>1</sup>For purposes of the Request, unless otherwise specified, the term "records" includes but is not limited to all communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, spreadsheets, charts, rules, manuals, technical specifications, training materials, and studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications, including text messages, and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations

3. Records related to OFO's operational and/or processing capacity for Class A POEs dating from December 2022 to the present. These records should include, but are not limited to, Queue Management Reports or other records regarding queue management.
4. From February 1, 2023 until the present, records of communications between Mexican government officials, including but not limited to, staff from Mexico's Instituto Nacional de Inmigración ("INM"), Mexican federal police, Mexico's Guardia Nacional or National Guard, Mexican state law enforcement, Mexican officials from Bienestar Social, and other Government of Mexico ("GOM") officials, and any CBP Field Office or OFO staff member about CBP One appointments and undocumented noncitizens' access to Class A POEs.
5. From May 11, 2023 until the present, the following data per month:
  - a. the aggregate number of noncitizens with CBP One appointments processed at each Class A POE broken down by noncitizens' country of citizenship;
  - b. the aggregate number of noncitizens without CBP One appointments processed at each Class A POE broken down by noncitizens' country of citizenship;

## II. FORMAT OF PRODUCTION

Requestors seek responsive electronic records in a machine-readable, native file format, with all metadata and load files. We request that any data be provided in a workable format, such as Microsoft Excel or comma-separated values (CSV) files. If terms or codes are not in the form template and/or publicly defined, please provide a glossary or other descriptive records containing definitions of acronyms, numerical codes, or terms contained in data responsive to this request. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. For non-data files, Requestors ask that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

## III. EXPEDITED PROCESSING

Requestors seek expedited treatment for this FOIA request pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e)(1)(iii). As noted below, there is an "urgency to inform the public concerning the actual or alleged Federal Government activity," 5 U.S.C. § 552(a)(6)(E)(v)(II), and a federal court has determined that preventing asylum seekers from accessing inspection and processing at POEs violates their "due process rights," 6 C.F.R. § 5.5(e)(1)(iii). *See Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1049 (S.D. Cal. 2022). There is an urgent need to inform the public, asylum seekers, and legal and humanitarian service providers about the records subject to this request, as they would shed light on the federal government's current treatment of asylum seekers, many of whom are highly vulnerable individuals and families, in light of rapidly changing policies, practices, and conditions at the U.S.-Mexico border.

The ability of asylum seekers to access ports of entry along the southwest border is an issue of urgent humanitarian importance that implicates their constitutional rights. Since 2016, individuals seeking protection in the United States who approach POEs have faced a variety of obstacles to accessing the asylum system. These include CBP's policy and practice of metering individuals; the global COVID-19 pandemic and implementation of the Title 42 policy; and the recently promulgated Circumvention of

Lawful Pathways regulation.<sup>2</sup> Last year, a federal judge held that the federal government’s “refusal to provide inspection or asylum processing to noncitizens . . . in the process of arriving in the United States at Class A Ports of Entry is unlawful” under the Fifth Amendment Due Process Clause. *Al Otro Lado, Inc.*, 619 F. Supp. 3d at 1049. In light of CBP’s resumption of processing of noncitizens under Title 8 of the Immigration and Nationality Act, it is crucial to understand whether the government’s current treatment of asylum seekers complies with the U.S. Constitution and federal immigration law. Because there are recent reports documenting instances of CBP illegally turning back asylum seekers from POEs,<sup>3</sup> the subject matter of this request – which could substantiate the U.S. government’s policy of preventing access to POEs -- involves the “loss of substantial due process rights.” 6 C.F.R. § 5.5(e)(1)(iii).

Individuals from around the world continue to look to the United States for refuge in the face of violence, persecution, and political, economic, and environmental crises. But the conditions asylum seekers face in northern Mexico while waiting for the opportunity to access asylum are dire. They include widespread violence, lack of access to shelter and medical services, and extreme economic deprivation.<sup>4</sup> As a result of these circumstances, thousands of asylum seekers at or near the U.S.-Mexico border and organizations that provide services for them are urgently in need of concrete information about how CBP is managing the inspection and processing of migrants.<sup>5</sup>

Moreover, the situation at the U.S.-Mexico border is currently a subject of ongoing intense media and public interest due to lifting of Title 42-related restrictions in May 2023 and expectations that the U.S. government would resume processing of asylum seekers. The media and public scrutiny of government conduct at the border is heightened because of the novel requirement that most asylum seekers use CBP One to make appointments at POEs. This new pathway to accessing the asylum system has generated significant public interest and confusion about how use of the app impacts migrants.<sup>6</sup> Because CBP’s use of the app has such momentous consequences for noncitizens fleeing persecution and violence, it is urgent that the public gain a fuller understanding of how the government is deploying it.

We hereby certify that the foregoing is true and correct to the best of our knowledge and belief.

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<sup>2</sup> See, e.g., Stephanie Leutert and Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: May 2023*, The University of Texas at Austin Strauss Center for International Security and Law, May 2023, [https://www.strausscenter.org/wp-content/uploads/May\\_2023\\_Asylum\\_Processing.pdf](https://www.strausscenter.org/wp-content/uploads/May_2023_Asylum_Processing.pdf)

<sup>3</sup> See, e.g., *id.*; *Limits on Access to Asylum After Title 42: One Month of Monitoring U.S.-Mexico Border Ports of Entry* (International Rescue Committee), June 23, 2023, <https://www.rescue.org/report/limits-access-asylum-after-title-42-one-month-monitoring-us-mexico-border-ports-entry>

<sup>4</sup> See, e.g., *Lives at Risk: Barriers and Harms as Biden Asylum Ban Takes Effect*, *Hum. Rts. Rep.* (Amnesty Int’l, New York, NY), May 18, 2023, <https://www.amnestyusa.org/wp-content/uploads/2023/05/Lives-at-Risk-Barriers-and-Harms-As-Biden-Asylum-Ban-Takes-Effect.pdf>; Stef W. Knight, *What the U.S. doesn’t see*, *Axios*, May 26, 2023, <https://www.axios.com/2023/05/26/border-mexico-us-immigration-policy>.

<sup>5</sup> See, e.g., Camilo Montoya-Galvez, *Title 42 ends with 60,000 migrants waiting near U.S.-Mexico border*, *CBS News*, May 12, 2023, <https://www.cbsnews.com/news/title-42-expiration-60000-migrants-us-mexico-border-patrol-raul-ortiz/>; Uriel J. Garcia, *Migrants waiting to cross the border say government’s app for asylum-seekers is a mess*, *The Texas Tribune*, May 9, 2023, <https://www.texastribune.org/2023/05/09/texas-border-title-42-migrants-phone-app/>.

<sup>6</sup> See, e.g., Sanya Mansoor, *Extreme Asylum Claims Aren’t Prioritized in New U.S. Government App*, *TIME*, May 25, 2023, <https://time.com/6282428/asylum-claims-government-app-violence-migrants/>; John Salazar, *Asylum seekers impatient with CBP One app*, *Spectrum News 1*, June 7, 2023, <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2023/06/07/asylum-seekers-impatient-with-cbp-one-app->

#### IV. FEE WAIVER REQUEST

Requestors seek a fee waiver on the grounds that disclosure of the requested records is in the public interest and 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 requestor.” 5 U.S.C. § 552(a)(4)(A)(iii).

##### 1. *Disclosure of the Information Is in the Public Interest*

The public interest criteria is satisfied when (1) the request concerns operations or activities of the government; (2) disclosure is likely to contribute to an understanding of government operations or activities; (3) disclosure contributes to an understanding of the subject by the public at large; and (4) disclosure is likely to contribute significantly to such understanding.<sup>7</sup>

CBP is the component within the U.S. Department of Homeland Security (“DHS”) with authority to inspect and process asylum seekers. The agency’s recent deployment of CBP One, a mobile application for smartphones, to allow noncitizens to directly make appointments for inspection at ports of entry along the U.S.-Mexico border is unprecedented. CBP’s requirement that migrants use CBP One has significant legal, privacy, and humanitarian implications for migrants, border communities, and service providers around the country. Unsurprisingly, the app and its consequences have generated widespread public interest and concern, including among elected officials seeking additional information about its impact.<sup>8</sup>

This request is in the public interest because it meets all the necessary criteria. First, Requestors seek information that concerns CBP’s operations; in particular, requestors seek information about how the agency manages the flow of migrants without CBP One appointments who approach POEs in order to seek asylum. The requested information will shed light on CBP’s current operations, including how the agency’s embrace of CBP One has impacted the agency’s treatment of asylum seekers at the U.S.-Mexico border.

Second, disclosure of the requested procedures and data will contribute to the public’s and Requestors’ understanding of whether CBP’s use of CBP One is impacting the federal government’s compliance with immigration law and the U.S. Constitution. *See Al Otro Lado, Inc.*, 619 F. Supp. 3d at 1049 (refusal to “provide inspection or asylum processing” to noncitizens in the process of arriving at POEs “is unlawful regardless of the purported justification for doing so”). A clear picture of CBP’s protocols for inspecting and processing noncitizens without CBP One appointments, and the resulting data regarding the numbers of migrants processed at each POE, is also crucial for public understanding of whether the government’s deployment

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<sup>7</sup> 6 C.F.R. § 5.11(k)(2) (2017) (DHS regulations outlining criteria for responses to requests for fee waivers under FOIA); see also *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing 28 C.F.R. § 16.11(k)(2)).

<sup>8</sup> See, e.g., Press Release, *Booker Expresses Concerns over CBP Mobile Application for Asylum Seekers*, U.S. Senator Cory Booker, March 28, 2023, <https://www.booker.senate.gov/news/press/booker-expresses-concerns-over-cbp-mobile-application-for-asylum-seekers>; *Glitches plague CBP One app for asylum-seekers as Title 42 comes to an end*, PBS News, Apr. 22, 2023, <https://www.pbs.org/newshour/show/glitches-plague-cbp-one-app-for-asylum-seekers-as-title-42-comes-to-an-end>

of CBP One has been effective and fair.<sup>9</sup>

Finally, the agency's disclosure of these records to Requestors will significantly contribute to the public's understanding of how CBP One is impacting the government's treatment of asylum seekers. The novel use of the app, its evolving capabilities and features, and constantly changing policies and practices at the U.S.-Mexico border have generated confusion and concerns regarding access to the asylum system at ports of entry.<sup>10</sup>

Both the Council and CGRS are non-partisan organizations that have experience in disseminating information related to immigration in the United States, including information obtained through the FOIA. The Council, a non-profit organization, regularly provides information, including fact sheets, reports and other publications to the public based on its FOIA requests.<sup>11</sup> This information reaches a wide audience, which includes varied segments of the U.S. public. This information reaches a wide audience, which includes varied segments of the U.S. public. The Council intends to provide information received in response to this FOIA request on its publicly accessible website. In 2022, the Council received more than 2.6 million pageviews from more than 1.6 million visitors. The Council also regularly shares information with national print and news media and plans to distribute information obtained from these FOIA disclosures to interested media. In keeping with its track record of synthesizing or otherwise publishing information on governmental operations shared in responses to FOIA requests, the Council intends to provide information received in response to this FOIA request on its publicly accessible website.

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<sup>9</sup> See, e.g., Salvador Rivera, *Number of asylum seekers waiting to cross border doubles as San Ysidro Port of Entry*, Border Report, June 2, 2023, <https://www.borderreport.com/news/number-of-asylum-seekers-waiting-to-cross-border-doubles-at-san-ysidro-port-of-entry/> (reporting large increases in the number of asylum seekers waiting to cross the border without CBP One appointments); Camilo Montoya-Galvez, *CBP One app becomes main portal to U.S. asylum system under Biden border strategy*, CBP News, Apr. 11, 2023, <https://www.cbsnews.com/news/cbp-one-app-us-border-asylum-biden/> (noting statements that CBP One "is like reducing asylum to Ticketmaster").

<sup>10</sup> See, e.g., Richard Allyn, *Migrants at border frustrated with CBP One app despite update*, CBS 8, May 12, 2023, <https://www.cbs8.com/article/news/investigations/beyond-the-border/migrants-at-border-frustrated-with-cbp-one-app/509-1f910230-e42c-4a92-8c80-6c5bc288b3e6>; Press Release, *Senator Markey Calls on DHS to Ditch Mobile App Riddled with Glitches, Privacy Problems, for Asylum Seekers*, U.S. Senator Edward J. Markey, Feb. 21, 2023, <https://www.markey.senate.gov/news/press-releases/senator-markey-calls-on-dhs-to-ditch-mobile-app-riddled-with-glitches-privacy-problems-for-asylum-seekers>.

<sup>11</sup> See, e.g., American Immigration Council, "Government Documents Reveal Information about the Development of the CBP One App," (Feb. 28, 2023), <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app>; American Immigration Council, "The Electronic Nationality Verification Program: An Overview," (Jan. 26, 2021), <https://www.americanimmigrationcouncil.org/research/electronic-nationality-verification-program-overview>; Guillermo Cantor *et al.*, "Changing Patterns of Interior Immigration Enforcement in the United States," 2016 -2018, American Immigration Council (July 1, 2019), <https://americanimmigrationcouncil.org/research/interior-immigration-enforcement-united-states-2016-2018>; American Immigration Council, "Stays of Removal Responses from EOIR" (May 2019), [https://americanimmigrationcouncil.org/sites/default/files/foia\\_documents/board\\_of\\_immigration\\_appeals\\_interpretation\\_of\\_stay\\_of\\_removal\\_foia\\_production.pdf](https://americanimmigrationcouncil.org/sites/default/files/foia_documents/board_of_immigration_appeals_interpretation_of_stay_of_removal_foia_production.pdf); Guillermo Cantor & Walter Ewing, "Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered, American Immigration Council" (Aug. 2017), [http://bit.ly/Council\\_StillNoActionTaken](http://bit.ly/Council_StillNoActionTaken).

CGRS, which is based at the University of California College of the Law, San Francisco, provides technical assistance and publishes reports, policy analysis, and other educational materials that are widely disseminated, including through its website. Some materials are fully available to the public, and some are made available free of charge to registered users—including members of tax-exempt organizations, non-profit groups, lawyers, academics, law students, refugees, and asylum seekers. CGRS also publishes an electronic newsletter distributed to subscribers via email, regularly conducts nation-wide trainings and webinars, and releases information via social media platforms such as Twitter and Facebook.

Requestors' demonstrated ability to effectively convey and disseminate information requested will contribute to the public's understanding of CBP's treatment of asylum seekers at the U.S.-Mexico border, an issue of considerable public interest. Further, Requestors' commitment to share this information widely and free of charge among their networks of supporters and anyone who accesses their websites ensures that disclosure is likely to significantly contribute to the public's understanding of the issue.

Thus, the request for information meets the public interest element for the fee waiver request rule.

2. *Disclosure of the information is not in Requestors' Commercial Interest.*

Requestors have no commercial interest in the records requested, and this request aims at furthering public understanding of government conduct: specifically, as described above, the urgent need for the public to understand how Customs and Border Protection is operating as to its treatment of asylum seekers at the U.S.-Mexico border.

The Council, as a not-for-profit organization, has no commercial interest in the present request. This request furthers the Council's work to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. As with all other reports and information available on the Council's website, as well as information frequently disseminated to the public via electronic newsletters, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, policymakers, and other interested members of the public free of charge.

CGRS plans to make disclosures obtained through this request available to its audience, which includes members of other tax-exempt organizations, non-profit groups, refugees, asylum seekers and other migrants, lawyers, academics, and law students, free of charge. As an educational institution and not-for-profit organization, CGRS has no commercial interest in the present request.

As FOIA's fee-waiver requirements must be liberally construed in favor of waivers for noncommercial requestors, a waiver of all fees is justified and warranted in this case.

Thank you for your attention to this request. If you have any questions regarding this request, please do not hesitate to contact me.

Very truly yours,

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on behalf of Requestors