



May 14, 2020

SENT VIA FOIAOnline

U.S. Customs and Border Protection
Freedom of Information Act Office

Re: **FOIA Request for Records Related to U.S. Customs and Border Protection Response to COVID-19**

Dear Freedom of Information Officer:

The American Immigration Council (“Council”) and the ACLU Border Rights Center (“Center”) submit this Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, request for production of records (“Request”). The Council and the Center also seek a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A) and 6 C.F.R. § 5.11(k), and for the Request to be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e).

I. Request for Information

The Council and the Center seek records that were prepared, received, transmitted, collected and/or maintained by U.S. Customs and Border Protection (CBP) and its subsidiary components, U.S. Border Patrol (Border Patrol) and Office of Field Operations (OFO), described below.

For purposes of the Request, the term “records” includes but is not limited to any and 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 and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

Please do not produce CBP, Border Patrol or OFO guidance regarding COVID-19 already publicly available on CBP’s website.¹

¹ See U.S. Customs and Border Protection, *CBP COVID-19 Updates and Announcements*, <https://www.cbp.gov/newsroom/coronavirus> (last visited April 27, 2020).

II. Records Requested

1. Records issued by CBP, Border Patrol (including its Sectors) and/or OFO (including its sub-offices) related to COVID-19 including but not limited to:
 - a. recommendations for changes or additions to intake medical screening
 - b. monitoring of detained individuals with exposure risk who do not present with fever or symptoms
 - c. treatment of individuals who would be at high risk for serious illness or death in the event of COVID-19 infection based on their age and/or underlying medical conditions
 - d. treatment of detained individuals with fever and/or symptoms of respiratory illness
 - e. testing of individuals with exposure risk or who present with fever or other symptoms
2. Records related to separately detaining individuals ill with COVID-19 or at risk of contracting COVID-19 within facilities at the following locations:
 - a. Border Patrol stations within the:
 - i. Big Bend, Del Rio, Laredo, El Paso, and Rio Grande Sectors in Texas;
 - ii. Tucson or Yuma Sectors in Arizona; and
 - iii. El Centro and San Diego Sectors in California
 - b. Each Port of Entry in Arizona, California, New Mexico and Texas
3. Guidance for the release of individuals in CBP, Border Patrol or OFO custody who are at risk of contracting or who have contracted COVID-19, including the use of parole
4. Protocols for cleaning and sanitizing CBP facilities in response to COVID-19
5. Guidance provided to individuals about COVID-19 when they are released from CBP custody
6. Communication with and training provided to sub-contractors and employees of CBP about limiting the spread of COVID-19

III. Data Requested

1. The number of confirmed cases of COVID-19 of individuals in the custody of either Border Patrol or OFO within each of the following locations:
 - a. Border Patrol stations within the:
 - i. Big Bend, Del Rio, Laredo, El Paso, and Rio Grande Sectors in Texas;
 - ii. Tucson or Yuma Sectors in Arizona; and
 - iii. El Centro and San Diego Sectors in California
 - b. Each Port of Entry in Arizona, California, New Mexico and Texas
2. The number of individuals in the custody of either Border Patrol or OFO who have been identified as needing medical assistance because of suspected or confirmed COVID-19-related reasons within each of the following locations:
 - a. Border Patrol stations within the:
 - i. Big Bend, Del Rio, Laredo, El Paso, and Rio Grande Sectors in Texas;

- ii. Tucson or Yuma Sectors in Arizona; and
 - iii. El Centro and San Diego Sectors in California
 - b. Each Port of Entry in Arizona, California, New Mexico and Texas
- 3. The number of individuals in Border Patrol or OFO custody who have been transferred to an external hospital center or urgent care facility for treatment related to COVID-19 from each of the following locations:
 - a. Border Patrol station within the:
 - i. Big Bend, Del Rio, Laredo, El Paso, and Rio Grande Sectors in Texas;
 - ii. Tucson or Yuma Sectors in Arizona; and
 - iii. El Centro and San Diego Sectors in California
 - b. Each Port of Entry in Arizona, California, New Mexico and Texas

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this Request would be considered within the Request's scope.

With respect to the form of production, the Council and the Center request that responsive electronic records be provided electronically in their native file format, if possible, with all metadata and load files. Alternatively, the Council and the Center request 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. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits.

IV. Fee Waiver Request

The Council and the Center seek a fee waiver because the information sought in the Request 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 [requesters]...." 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

A. Disclosure Will Contribute to Public Understanding of CBP Guidelines Regarding the COVID-19 Pandemic

Individuals detained in CBP facilities are at risk of experiencing an outbreak of COVID-19. Large numbers of individuals confined together are not able to follow public health guidelines for maintaining a safe distance from each other to avoid the spread of COVID-19.²

² Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How to Protect Yourself*, March 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (people should avoid "close contact" with sick people and "put distance" between themselves and other people if COVID-19 is spreading in their community) (last visited March 18, 2020); *See also* The White House and Centers for Disease Control and Prevention, *The President's Coronavirus Guidelines for*

Individuals detained in CBP facilities have been victims of infectious disease outbreaks in the past. In May 2019, CBP suspended intake at the McAllen Central Processing Center after 32 detainees tested positive of influenza.³ Similarly, during the same period, there were 81 confirmed cases of flu amongst asylum-seekers whom CBP flew from Texas to facilities in San Diego.⁴ Outbreaks of scabies, shingles and chickenpox all occurred among children held in a CBP facility in Clint, Texas.⁵ Tragically, at least two children have died from complications of the flu while in CBP custody.⁶

In addition, stakeholders and public health officials have long been concerned about the potential for outbreaks of infectious illnesses in CBP facilities. Both doctors and Members of Congress repeatedly called on CBP to administer the flu vaccine to those held in its facilities.⁷ Already, more than two dozen CBP officers working on the southern border are reported to be infected with COVID 19,⁸ which underscores the importance of an effective COVID 19 plan to ensure that the disease does not spread to other employees and their families, as well as among those detained.

The Request seeks the disclosure of information that will enhance the public's understanding of steps CBP has taken to protect detained individuals from an outbreak of COVID-19 and steps CBP will take to identify and treat detained individuals who are at risk of infection or who have become infected. As outlined further below, the Council and the Center intend to make the information received in response to the Request available to the public at no charge. Further, the Council and the Center reach a broad audience, which includes varied segments of the U.S. public.

America, March 16, 2020, <https://www.whitehouse.gov/briefings-statements/coronavirus-guidelines-america/> (cautioning people to avoid groups of more than 10 people) (last visited March 18, 2020).

³ See John Burnett and Joel Rose, *Border Facility Temporarily Suspends Migrant Intake After 32 Identified With Flu*, National Public Radio, May 22, 2019, <https://www.npr.org/2019/05/22/725652420/migrant-processing-center-temporarily-closing-after-flu-related-outbreak>.

⁴ *Flu Outbreak Among Immigrant Detainees From Texas Continues As Count of Sick Rises to 81*, Times of San Diego, May 19, 2019, <https://timesofsandiego.com/politics/2019/05/30/flu-cases-among-immigrant-detainees-from-texas-worsen-count-of-sick-rises-to-81/>.

⁵ See *The stuff of nightmares: Inside the migrant detention center in Clint, Texas*, USA Today, July 6, 2019, <https://www.usatoday.com/story/news/politics/2019/07/06/border-patrol-el-paso-sector-migrant-detention-center-clint-immigration/1664887001/>.

⁶ Nomaan Merchant, *Doctors alarmed that flu killed detained migrant teen*, KFOS 14, June 6, 2019, <https://kfoxtv.com/news/nation-world/doctors-alarmed-that-flu-killed-detained-migrant-teen>.

⁷ See, e.g., Molly Hennessy Fiske, *After child deaths, doctors pressure Border Patrol to let them administer flu vaccines*, Los Angeles Times, Nov. 19, 2019, <https://www.latimes.com/world-nation/story/2019-11-19/la-na-border-patrol-migrant-flu>; Elizabeth Cohen and John Bonifield, *Lawmakers call lack of vaccinations at the border 'unconscionable' in letter to CBP*, CNN, Dec. 17, 2019, <https://www.cnn.com/2019/12/16/health/cbp-flu-vaccine-letter/index.html>.

⁸ Rafael Carranza, *US Customs and Border Protection confirms 160 COVID-19 cases among officers, agents*, USA Today, Apr. 6, 2020, <https://www.usatoday.com/story/news/nation/2020/04/06/coronavirus-cbp-160-cases-covid-19-officers-agents/2958736001/>.

The Council regularly provides information to the public based on its FOIA requests.⁹ It synthesizes and publishes information about governmental operations obtained from FOIA requests on its publicly accessible website. The Council intends to do the same with documents received in response to this request. For calendar year 2019, the Council received approximately 2.6 million pageviews from 1.5 million unique visitors.

The Border Rights Center and the ACLU of Texas, which houses the Border Rights Center, are “primarily engaged in disseminating information” within the meaning of the FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II). *See also* 6 C.F.R. § 5.5(e)(1)(ii). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding 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” to be “primarily engaged in disseminating information”).¹⁰ The Center does this work alone and with national partners and allies. The Center, regularly creates and disseminates works in the form of presentations, reports, articles, interviews, testimony, social media, and blog posts to educate the public about the activities of the United States government.¹¹ The ACLU of Texas regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and civil liberties.¹²

B. Disclosure of the Information Is Not in the Commercial Interest of the Council or the Center

⁹ *See, e.g.*, Guillermo Cantor, Emily Ryo, and Reed Humphrey, “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; Guillermo Cantor and Walter Ewing, AMERICAN IMMIGRATION COUNCIL, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (August 2017) (examining records of alleged misconduct by Border Patrol employees), http://bit.ly/Council_StillNoActionTaken.

¹⁰ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

¹¹ *See generally* Immigrant Rights, ACLU Tex., available at <https://www.aclutx.org/en/issues/immigrants-rights>.

¹² *See generally* Know Your Rights, ACLU Tex., available at <https://www.aclutx.org/en/know-your-rights/>.

The Council is a not-for-profit organization and has no commercial interest in the Request. See e.g. 6 C.F.R. § 5.11(k)(3)(i)-(ii). The 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, the information that the Council receives in response to the Request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge. The Center also has no commercial interest in the Request and plans widely publish and disseminate the information obtained through the FOIA to the press and public. See discussion *supra* IV Part A.

Given that FOIA's fee-waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

V. Request to Expedite

The Council and the Center also ask that CBP expedite the Request. Expedited treatment is warranted under the statute and governing regulations. See 5 U.S.C. § 552(a)(6)(E)(i); 6 C.F.R. § 5.5(e).

A request qualifies for expedited treatment if one of the following criteria are met:

"(i) circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information; (iii) The loss of substantial due process rights; or (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."

6 C.F.R. § 5.5(e)(1)(i)-(iv). A FOIA request need meet only one of the four criteria for expedited treatment. Here, the lack of expedited processing poses a significant threat to the lives of detained individuals and a heightened threat to a vulnerable segment of these individuals. 6 C.F.R. § 5.5(e)(1)(i). The Centers for Disease Control and Prevention has stated that "older adults and people who have severe underlying chronic medical conditions or lung disease or diabetes seem to be at higher risk for developing more serious complications from COVID-19 illness."¹³ Because individuals detained in CBP facilities currently are held, and must sleep, in

¹³ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How to Protect Yourself*, March 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

close proximity to each other and cannot isolate themselves, it is critical to immediately understand steps CBP has taken to prepare for a COVID-19 outbreak.

In addition, the information the Council and the Center seek is crucial in understanding the protocols and guidance that CBP has in place to respond to outbreaks that threaten the lives of individuals in its custody. Given CBP's track record with respect to other outbreaks of infectious diseases, the public has a right to know how CBP intends to safeguard thousands of detained individuals, avoiding their unnecessary illness and possible death.

The Council and the Center also meet the second prong for expedite treatment. 6 C.F.R. § 5.5(e)(1)(ii). The Council is primarily engaged in the dissemination of information and intends to make the information it receives in response to the Request available to the public. See discussion *supra* IV Part A. The Center also is primarily engaged in the dissemination of information. *Id.* CBP has released only general information to the public regarding its plans for detained individuals. Given the risk to detained individuals, the lack of transparency regarding CBP's readiness to react to a COVID-19 outbreak, and concern about lack of adequate medical treatment for detained individuals in CBP custody, there is an urgent need for the public to understand the information sought in this FOIA.

U.S. Customs and Immigration Enforcement (ICE) recently granted an expedite to the Council for a similar FOIA request seeking information about ICE's preparation for and response to COVID-19. See Exhibit A. An expedite request is similarly warranted here.

Pursuant to 5 U.S.C. § 552(a)(6)(E)(vi), I certify the statement in support of the request for expedited treatment to be true and correct to the best of my knowledge and belief.

Thank you in advance for your attention to the Request. If you have any questions, please feel free to email or call me at the contact information below.

Sincerely,



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