



January 23, 2014

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

Karen Neuman  
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U.S. Department of Homeland Security  
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Washington, DC 20528-0655  
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***Re: Freedom of Information Act Request / Expedited Processing Requested***

Dear Ms. Neuman:

This is a request for records made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and the relevant 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 Foundation (“ACLU”) of Arizona<sup>1</sup> and University of Arizona James E. Rogers College of Law Professors Jane Bambauer and Derek Bambauer (collectively, “Requesters”).

Requesters seek the disclosure of records related to U.S. Border Patrol’s checkpoint operations, as detailed below under “Records Requested.”

**BACKGROUND**

Since 2006, the U.S. Border Patrol 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 \$12.9 billion in FY 2014.<sup>2</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies – more than on all other federal law

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<sup>1</sup> The American Civil Liberties Union Foundation 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, educates the public about civil rights and civil liberties issues across the country, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes the ACLU’s members to lobby their legislators.

<sup>2</sup> *See* DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), *available at* <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>.

enforcement combined.<sup>3</sup> One result of these unprecedented expansions is an increase in reported Border Patrol abuses in the Arizona-Sonora region and nationally.<sup>4</sup> These include frequent complaints the ACLU receives from residents subjected to extended detentions, interrogations, unlawful searches, and other mistreatment at Border Patrol checkpoints.

Neither CBP nor the Department of Homeland Security (“DHS”) have released any information in recent years about the total number of checkpoints in operation nationally. According to a 2009 U.S. Government Accountability Office (“GAO”) report,<sup>5</sup> the Border Patrol operates approximately 71 permanent and tactical checkpoints across the southwest.<sup>6</sup> These operations stem from Border Patrol’s authority to conduct warrantless 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> In practice, Border Patrol often ignores that limitation, roaming still further into the interior of the country.<sup>10</sup> In Arizona, most checkpoints are located on

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<sup>3</sup> See Meissner, Doris, *et al.*, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE, (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

<sup>4</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 <http://www.dhs.gov/department-wide-data-complaints-received>. Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported.

<sup>5</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) available at <http://www.gao.gov/assets/300/294548.pdf>.

<sup>6</sup> *The Arizona Republic*, however, reports that as of Fiscal Year 2008 there were a total of 128 checkpoints nationwide. See Bob Ortega, *Interior Border Checks Spur Suit*, ARIZONA REPUBLIC, Jan. 16, 2014, available at <http://www.azcentral.com/news/politics/articles/20140115interior-border-checks-spur-suit.html>

<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. It may have been that 100 miles had historically been considered a “reasonable” distance regarding availability of witnesses for examination, responses to subpoenas, and other discovery issues under federal law. See, e.g., 10 U.S.C. § 849; FED. R. CRIM. P. 7; FED. R. CIV. P. 45.

<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 Act (FOIA) request uncovered design plans for permanent checkpoints on southbound New England highways. See ACLU OF VERMONT, SURVEILLANCE ON THE NORTHERN BORDER, (Sept. 17, 2013), available at [http://www.acluvt.org/surveillance/northern\\_border\\_report.pdf](http://www.acluvt.org/surveillance/northern_border_report.pdf).

<sup>10</sup> See, e.g., See Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at [http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0) (describing checkpoint stop of Senator Patrick Leahy 125 miles south of the border in New York state: “When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, ‘That’s all the authority I need.’”); Michelle Garcia, *Securing the Border Imposes a Toll on Life in Texas*, AL JAZEERA AMERICA, Sept. 25, 2013, available at [http://america.aljazeera.com/articles/2013/9/25/living-under-thelawofbordersecurity.html#mainpar\\_adaptiveimage\\_0](http://america.aljazeera.com/articles/2013/9/25/living-under-thelawofbordersecurity.html#mainpar_adaptiveimage_0) (“[W]hen it was pointed out that [Alice, Texas] sits more than 100 miles from the border, [a Border Patrol spokesman] explained that ‘the law does not say that we cannot patrol. Our jurisdiction kinda changes.’”); see also *United States v. Venzor-Castillo*, 991 F.2d 634 (10th Cir. 1993) (finding Border Patrol lacked reasonable suspicion to stop and search vehicle approximately 235 miles from the border where agent had no knowledge regarding the origin of the vehicle).

rural state highways between 25 and 50 miles north of the border, many of them in the vicinity of southern Arizona towns and cities.

Checkpoints have had profoundly negative impacts on border communities. Residents of the town of Arivaca, Arizona have petitioned for the removal of one of several local checkpoints, citing rights violations and harassment as well as harm to property values, tourism, and quality of life resulting from operation of the checkpoint.<sup>11</sup> On January 15, 2014, the ACLU submitted an administrative complaint to DHS on behalf of fifteen individuals detained without lawful basis at six southern Arizona checkpoints.<sup>12</sup> These individuals were variously subjected to interrogation not related to verifying citizenship, unwarranted searches, racial profiling, verbal harassment, and physical assault, among other abuses. Several reported Border Patrol service canines alerted to contraband when none was present. These accounts are representative of numerous other checkpoint-related complaints the ACLU receives on a regular basis.

The U.S. Supreme Court has upheld the constitutionality of immigration checkpoints only insofar as they involve a brief inquiry into residence status. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-60 (1976). In *Martinez-Fuerte*, the Court specified that neither vehicles nor occupants should be searched, and referrals to secondary inspection areas should involve “routine and limited inquiry into residence status” only. *Id.* at 560. The Court noted that local residents are “waved through the checkpoint without inquiry.” *Id.* at 550. Today, however, Border Patrol checkpoints often appear to be operated as general crime control checkpoints – which are unconstitutional<sup>13</sup> – and not for the limited purpose of verifying residence status.<sup>14</sup> Local residents are not “waved through,” but are often subjected to extended questioning and searches unrelated to verifying residence status. In practice, Border Patrol checkpoints bear little resemblance to those condoned by the Supreme Court almost 40 years ago in *Martinez-Fuerte*.

Checkpoint abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS. The 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>15</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

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<sup>11</sup> Arivaca Checkpoint Petition, available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-checkpoint-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

<sup>12</sup> Complaint available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

<sup>13</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), discussed *infra*.

<sup>14</sup> At a time when apprehensions of border crossers are at 40-year lows, CBP’s own figures indicate that most checkpoint drug arrests involve U.S. citizens. Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens*, Records Show, CENTER FOR INVESTIGATIVE REPORTING, Mar. 26, 2013, available at <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312> (noting four out of five checkpoint drug arrests involve a U.S. citizen, three times as many in 2011 as in 2005).

<sup>15</sup> GAO-09-824, *infra* at \*28. Those findings were made in 2009, the last time the federal government conducted a thorough review of Border Patrol checkpoint operations and their impact on border residents and local communities. GAO’s “community impact” analysis omitted Tucson sector checkpoints on the grounds that, at the time, they were considered “tactical” and not permanent checkpoints. *Id.* at \*89.

internal transparency – have failed to keep pace with CBP’s rapid growth.<sup>16</sup> As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding checkpoint operations conducted by the largest law enforcement agency in the country.

### **RECORDS REQUESTED**

As used herein, the term “records” includes all records or communications preserved in electronic or written form, including but not limited to: correspondence; documents; data; videotapes; audio tapes; emails; faxes; files; guidance; guidelines; evaluations; instructions; analysis; memoranda; agreements; notes; orders; policies; procedures; protocols; reports; rules; manuals; specifications; and studies.

Should any responsive record contain the personal identifying information of any third party, Requesters ask that the agencies redact that information. This Request seeks aggregate stop data and records relevant to Border Patrol checkpoint operations, *not* any personal or identifying information about any specific individual(s).

Requesters seek disclosure of U.S. Border Patrol records pertaining to all tactical and permanent vehicle checkpoint operations in the Tucson and Yuma sectors, as well as any related records held by CBP or other agencies within DHS, to include at least:

- 1.) All records relating to Border Patrol tactical and permanent vehicle checkpoint operations in Tucson and Yuma Sectors from January 2011 to present, including but not limited to:
  - a. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials, and any other written policies or procedures pertaining to checkpoint operations in Tucson and Yuma sectors, including but not limited to:
    1. All documents related to application of U.S. law and agency guidelines at Border Patrol checkpoints, including but not limited to any legal limitations, or lack thereof, regarding checkpoint placement or location, and policies and procedures regarding questioning and detaining vehicle occupants, searching or entering the interior of vehicles, responding to motorists’ refusals to answer questions and/or consent to vehicle searches; and responding to motorists’ use of video and/or audio recording devices at checkpoints;
    2. All documents related to service canines, including all information related to training, certification, qualifications, and performance of service canines and service canine handlers, and any policies or procedures related to canines that falsely alert to the presence of contraband or concealed persons; and

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<sup>16</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 [http://www.oig.dhs.gov/assets/OIG\\_APP\\_FY04.pdf](http://www.oig.dhs.gov/assets/OIG_APP_FY04.pdf); DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>; 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 <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf>.

3. All documents related to citizen complaint procedures at checkpoints;
- b. Communications, agreements, or any other records related to collaboration or cooperation with, or the presence of, local law enforcement entities at checkpoints, including state and local police and sheriffs' departments;
  - c. Audits, reports, statistical data and analysis, quotas, targets, goals, and performance standards, measures, or reviews, and all documents related to any incentives or bonus programs relating to checkpoint operations in Tucson and Yuma sectors;
  - d. Inventories and records pertaining to all surveillance and inspection technologies and equipment, including non-intrusive inspection technologies, such as a VACIS or backscatter X-ray machines, in use at each tactical and permanent checkpoint in Tucson and Yuma sectors;
  - e. Organizational charts, diagrams, or schematics, including records sufficient to show:
    1. The number and geographic location of all permanent and tactical Border Patrol vehicle checkpoints in Tucson and Yuma sectors;
    2. The total monthly hours of operation of each permanent and tactical Border Patrol vehicle checkpoints, by month, in Tucson and Yuma sectors; and
    3. Any plans, designs, studies, or diagrams for any additional vehicle checkpoints not currently in operation in Tucson and Yuma sectors;
  - f. Records regarding any individual stopped, searched, detained, and/or arrested at Border Patrol checkpoints in Tucson and Yuma sectors, including but not limited to:
    1. Forms I-247;
    2. Forms I-213;
    3. Forms I-286;
    4. Forms I-44;
    5. Forms I-862;
    6. Forms I-826; and
    7. Forms I-210.
  - g. Records – in particular, but not limited to, all documents listed in Request 1.f above – relating to the following specific topics and/or containing information sufficient to show:
    1. The total number of arrests at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
    2. The total number of U.S. citizens arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
    3. The total number of undocumented individuals arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
    4. The basis for each checkpoint arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
    5. The basis for each checkpoint vehicle search resulting in arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;

6. The total number of alerts by service canines that resulted in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
  7. The total number of alerts by service canines that did not result in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
  8. All property seized at each checkpoint, the date seized, a description of the property seized, and the basis for the seizure, by month, for each of the years 2011, 2012, and 2013; and
  9. The names and badge numbers of the agent(s) involved in reviewing each arrest to determine whether reasonable suspicion or probable cause existed to justify each stop, and whether the reviewing agent(s) were the same as those who made the stop under review, by month, for each of the years 2011, 2012, and 2013;
- h. All complaints related to Border Patrol checkpoint operations in Tucson and Yuma sectors received by any Border Patrol, CBP, or DHS official from any person, organization, agency, tribal government, consular office, or any other entity, whether verbal or written, and all documents related or responding to any such complaints; and
  - i. All disciplinary records resulting from agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules and regulations related to checkpoint operations in Tucson and Yuma sectors.
- 2.) Records sufficient to show the maximum number and geographic location of all U.S. Border Patrol checkpoints – permanent and tactical – in operation nationwide during each of the years 1976 to the present.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive documents be provided electronically in text-searchable, static-image format (PDF), in the best image quality in the agencies' possession. 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.

### **REQUESTERS**

The ACLU 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 ACLU of Arizona is the state affiliate organization with over 7,000 supporters. The ACLU works daily in courts, legislatures, and communities 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.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials are widely available to everyone, including tax exempt organizations, non-profit groups, law students and faculty, for no cost. The ACLU also disseminates information through its websites, including [www.aclu.org](http://www.aclu.org) and [www.acluaz.org](http://www.acluaz.org). These websites address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to issues addressed by the ACLU, including documents obtained through the FOIA. The ACLU also publishes a widely read blog and electronic newsletter, which is distributed to subscribers by e-mail.

Derek Bambauer is Professor of Law at the University of Arizona James E. Rogers College of Law. An internationally-recognized scholar on Internet law, governmental transparency, and censorship, Professor Bambauer has written over two dozen academic articles, along with articles for popular media such as the Arizona Republic, Lifehacker.com, Arizona Attorney, and Legal Affairs Debate Club. Professor Bambauer has appeared in television, Internet, and recorded radio media including Bloomberg Law television, BronxNet Community Television, Huffington Post Live, Surprisingly Free podcast, and the U.S. Department of State Webchat. Since 2006, Professor Bambauer has written for the information law blog Info/Law <https://blogs.law.harvard.edu/infolaw/>, and has appeared as a guest blogger on the popular sites Prawfsblawg and Concurring Opinions. Professor Bambauer's research utilizes data from Freedom of Information Act requests to inform the public, legal scholars, and lawmakers about governmental transparency, Internet regulation, and the politics of intellectual property policy. *See, e.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863 (2012); Derek E. Bambauer, *Chutzpah*, 6 J. NAT'L SEC. L. & POL'Y 549 (2013). Bambauer's scholarly work is widely cited, and is the basis for his popular media writing.

Jane Yakowitz Bambauer is Associate Professor of Law at the University of Arizona James E. Rogers College of Law. Professor Bambauer has written ten academic articles and several shorter pieces for the popular press on the topics of data privacy and criminal procedure. Professor Bambauer has written articles for Huffington Post and Forbes.com, and she has appeared on Huffington Post Live, the Surprisingly Free podcast, and the O'Reilly Strata conference. Professor Bambauer has also written for the Info/Law blog since 2011. Professor Bambauer has used data previously collected using public records requests to study law school admissions practices and to analyze variance in compliance with public records laws. *See, e.g.*, Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J. L. & TECH. 1 (2011).

Both Derek Bambauer and Jane Bambauer 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.*

The Requesters qualify as “representative[s] of the news media.” Each requester is a person or 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); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). Courts have found other organizations whose mission, function, publishing, and

public education activities are similar in kind to the Requesters' to be "representatives of the news media." See, e.g., *Elec. Privacy Info. Center v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA); *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).

### **REQUEST FOR EXPEDITED PROCESSING**

We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment because there is a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i); see *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 27-28. The lack of expedited disclosure of these records could "reasonably be expected to pose an imminent threat to the life or physical safety of an individual," particularly if the incidents recounted above are part of a larger practice of abuse of authority by agents in the Customs & Border Protection sectors in the southwest border region or nationally. See 5 U.S.C. § 552(a)(6)(E)(v)(I); 6 C.F.R. § 5.5(d)(1)(i). From 2004-2011, as CBP doubled in size to more than 21,000 agents, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination.<sup>17</sup> In December 2013, a U.S. citizen died in Border Patrol custody at a checkpoint in California.<sup>18</sup> Residents of Arivaca, Arizona are petitioning for the removal of one of three local checkpoints, citing ongoing rights violations and harassment as well as harm to property values,<sup>19</sup> tourism, and quality of life resulting from checkpoint operations. The ACLU has also received increasing complaints related to Border Patrol checkpoints, including unlawful searches, prolonged detention, and verbal and physical abuse. Thus, there is a "compelling need" for the information requested.

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). Whether there is an "urgency to inform" depends on "(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." *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 29.

As previously explained, Requesters are "primarily engaged in disseminating information." This request concerns federal government activity and a matter of current exigency. Border Patrol checkpoint operations have attracted considerable media coverage and public attention in recent

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<sup>17</sup> See CRCL, "Department-wide Data on Complaints Received," *supra*.

<sup>18</sup> See Massound Hayoun, *U.S. Nationals 'Under Siege' Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013, available at <http://america.aljazeera.com/articles/2013/12/29/us-nationals-undersiegeamidssuspiciousborderpatrolcheckpointdeath.html>; see also Rob O'Dell & Bob Ortega, *Deadly Border Agents Incidents Cloaked in Silence*, ARIZONA REPUBLIC, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html> (Noting that 42 individuals have been killed by Border Patrol agents since 2005 and, "In none of the 42 deaths is any agent or officer publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.")

<sup>19</sup> See, e.g., Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT'L, Dec. 24, 2012, available at [http://www.nogalesinternational.com/news/study-correlates-checkpoint-with-home-value-drop/article\\_b158bc24-4de3-11e2-956a-0019bb2963f4.html](http://www.nogalesinternational.com/news/study-correlates-checkpoint-with-home-value-drop/article_b158bc24-4de3-11e2-956a-0019bb2963f4.html)

months. *See, e.g.*, Massound Hayoun, *U.S. Nationals ‘Under Siege’ Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013; Wes Kimball, *America’s Internal Checkpoints*, REASON, Dec. 28, 2013; Dan Shearer, *Protesters Demand Removal of Border Patrol Checkpoint Near Amado*, NOGALES INT’L, Dec. 6, 2013; Curt Prendergast, *Woman Challenges Border Patrol Checkpoint, and Wins*, GREEN VALLEY NEWS AND SUN, Oct. 12, 2013; Mark Davis, *Leahy: No Internal Border Patrol Checkpoints*, VALLEY NEWS, Oct. 1, 2013; Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens, Records Show*, CENTER FOR INVESTIGATIVE REPORTING, March 26, 2013; Cindy Cesares, *Border Patrol Takes ‘No’ For An Answer at Internal Checkpoints*, TEXAS OBSERVER, Mar. 7, 2013; Gary Brasher, *Ineffective, Harmful I-19 Checkpoint Needs to Go*, ARIZONA DAILY STAR, Jan. 1, 2013; Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT’L, Dec. 24, 2012; Jeff Biggers, *Not the First Time Arizona Governor Stopped*, SALON, July 5, 2012. A delayed response would compromise a significant interest because it would prevent the public from being able to engage in a timely, thoughtful debate regarding operations of the nation’s largest law enforcement agency at a time when documented cases of Border Patrol abuse – including checkpoint abuses – are increasing, and when Congress is considering additional agency resources as part of a comprehensive immigration reform package. *See, e.g.*, Daniel Newhauser, *GOP Insider: No Immigration Overhaul This Year*, ROLL CALL, Jan. 13, 2014; Ashley Parker, *House Democrats Crafting Immigration Proposal*, NY TIMES, Sept. 24, 2013; Gavin Aronsen, *Will the House Immigration Bill Scale Back on Border Militarization?* MOTHER JONES, July 25, 2013; Jerry Seper, *Former Border Patrol Agents Call Senate’s Immigration Plan ‘A Huge Waste of Resources,’* WASH. TIMES, July 11, 2013. Requesters have demonstrated a compelling need for the requested documents and expedited processing is warranted.

Requesters certify that their statements concerning the need for expedited processing are true and correct to the best of their knowledge and belief.

### **REQUEST FOR FEE WAIVER**

We request that the all fees associated with this request be waived pursuant to 6 C.F.R. § 5.11(b)(4) and (d)(1) (“No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.”) Requesters qualify as representatives of the news media, *see supra*. In addition, Professors Derek Bambauer and Jane Bambauer are employed by, and perform research as part of their scholarly work for, the University of Arizona James E. Rogers College of Law, which is an educational institution. Requesters meet the statutory and regulatory definitions entitling them to a fee waiver.

In the alternative, fees associated with this request should be waived pursuant to 6 C.F.R. § 5.11(k). Under § 5.11 (k), fees should be waived or reduced if disclosure is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and (2) not primarily in the commercial interest of the requester. Because Requesters have no commercial interest in disclosure, and because it will contribute significantly to public understanding of Border Patrol operations, a fee waiver e in this case satisfies the regulations, as well as Congress’s legislative intent in amending FOIA. *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.’”).

Pursuant to 6 C.F.R. § 5.11 (k)(2), the factors to consider in determining whether disclosure is in the public interest are: (i) “whether the subject of the requested records concerns the operations or activities of the government”; (ii) “whether disclosure of the records is likely to contribute to an

understanding of government operations or activities”, where “disclosable portions are meaningfully informative” and “likely to contribute to an increased public understanding of those [government] operations or activities”; (iii) whether the disclosure contributes “to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requestor”; and (iv) “whether the disclosure is likely to contribute significantly to public understanding.”

Disclosure pursuant to this request is in the public interest. First, the records pertain directly to the operations and activities of the federal government, of which CBP is an agency. Second, this request seeks to further public understanding of government conduct, and specifically to help the public determine whether individuals encountered, apprehended, and/or detained for civil immigration matters by the U.S. Border Patrol are treated in a manner that comports with our nation’s laws, and whether CBP personnel are properly investigated and held accountable when they fail to uphold those laws. Third, the Requesters qualify as representative of the news media and the records are sought to further scholarly research and disseminate that research to a broad audience. Finally, disclosure will contribute significantly to the public understanding of Border Patrol’s checkpoint operations. As discussed, checkpoint abuses are the subject of great public interest, and complaints of abuse are on the rise; nonetheless, there is still much that is unknown about Border Patrol checkpoint policies and practices and their impact on the public.

Requestors are therefore entitled to a total waiver of fees associated with this request. Should a total waiver be denied, fees should thus be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Please notify us in advance if the costs for document duplication exceed \$100.00.

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If this request is denied in whole or part, Requestors ask that you justify all deletions by reference to specific exemptions to the FOIA. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information, or to deny a waiver of fees.

Please furnish all responsive records to Professor Derek Bambauer by e-mail at [derekbambauer@email.arizona.edu](mailto:derekbambauer@email.arizona.edu) or by physical delivery at 1201 E. Speedway, Tucson, AZ, 85701; to Professor Jane Bambauer by e-mail at [janebambauer@email.arizona.edu](mailto:janebambauer@email.arizona.edu) or by physical delivery at 1201 E. Speedway, Tucson, AZ, 85701; and to James Lyall by e-mail at [jlyall@acluaz.org](mailto:jlyall@acluaz.org) or by physical delivery at P.O Box 17148, Phoenix, AZ, 85011.

We look forward to your reply to the request for expedited processing within ten business days as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding your decision on the matter of expedited processing, we look forward to your reply to the records request within twenty business days, as required by 5 U.S.C. § 552(a)(6)(A)(I).

Should you need to communicate with us regarding this request, please contact us by e-mail at the addresses above, or by telephone: 734.748.3535 (D. Bambauer), 520.626.6004 (J. Bambauer), or 520-344-7857 (J. Lyall).

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

James Lyall  
Staff Attorney  
ACLU of Arizona

Derek E. Bambauer  
Professor of Law  
University of Arizona  
James E. Rogers College of Law

Jane Bambauer  
Associate Professor of Law  
University of Arizona  
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