



February 11, 2015

***Sent Via Email – Original to Follow by Certified Mail***

Gregory McKay  
Director  
Arizona Department of Child Safety  
1717 West Jefferson S/CO05A  
Phoenix, Arizona 85007

***Re: Public Records Request***

Dear Mr. McKay:

Pursuant to Arizona's Public Records Law, A.R.S. § 39-101 *et seq.*, the ACLU of Arizona ("ACLU-AZ") hereby requests the right to examine and copy, or to be furnished with copies of, certain public records in the possession of the Arizona Department of Child Safety ("DCS").

We seek the following records<sup>1</sup> in written, electronic, audio, video, or other format:

1. From January 1, 2009 to present, by month, all records created pursuant to and/or pertaining to any investigation involving the U.S. Department of Homeland Security,<sup>2</sup> including:
  - a. complaints or reports of alleged or actual verbal, physical, and/or sexual abuse of children in Border Patrol custody, and any investigation resulting from such complaints or reports;

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<sup>1</sup> For purposes of this request, "Records" refers to all records or communications preserved in electronic or written form, including but not limited to: agreements; correspondence; documents; letters; notes; messages; emails; faxes; data; videotapes; audio tapes; files; forms; logs; records; guidance; guidelines; evaluations; audits; investigations; reviews; studies; reports; critiques; analysis; internal memoranda; legal opinions; orders; guidance; directives; training materials; criteria; standards; specifications; rules; instructions; manuals; advisories; protocols; procedures; policies; or other communications.

<sup>2</sup> "U.S. Department of Homeland Security" includes any sub-agency within the Department of Homeland Security, including Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and U.S. Border Patrol, as well as all Department of Homeland Security oversight agencies (including the Office of Inspector General, CBP Internal Affairs, ICE Office of Professional Responsibility, and the Office of Civil Rights and Civil Liberties).

- b. complaints or reports regarding conditions of confinement experienced by children in Border Patrol custody, and any investigation resulting from such complaints or reports; and
  - c. the result of any such investigation.
2. From January 1, 2009 to present, records sufficient to show,<sup>3</sup> by month:
  - a. the total number of cases involving U.S. Department of Homeland Security referred to DCS;
  - b. the source of the referral;<sup>4</sup> and
  - c. the total number of investigations opened in response.
3. From January 1, 2009 to present, all written policies, procedures, or other guidance related to the investigation of U.S. Border Patrol agents or other federal officials under state and federal child protection and child abuse reporting laws.
4. From January 1, 2009 to present, any complaints, audits, reviews, or other assessments regarding or pertaining to U.S. Border Patrol or other DHS agencies or officials.
5. From January 1, 2009 to present, Any communications with DHS or Office of Refugee Resettlement (ORR) officials regarding or pertaining to U.S. Border Patrol or other DHS agencies or officials.

Arizona Public Records Law carries with it a presumption that all records are “open to the public for inspection as public records.” *Carlson v. Pima County*,<sup>141</sup> Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). If the request is denied in part or in whole, please identify the records or categories of records withheld, and justify your denial by reference to the specific grounds on which information is withheld under the Public Records Law. All segregable portions of otherwise exempt material must be produced. We reserve the right to appeal your decision to withhold any information.

These records are not sought for any commercial purpose. The ACLU-AZ is a non-profit civil rights organization and this information will inform our investigation of the abuse and mistreatment of children in U.S. Border Patrol custody and the extent to which abuse allegations involving Border Patrol are reported and addressed. *See attached* ACLU December 3, 2014 Freedom of Information Act (FOIA) request. Nevertheless, we agree to reimburse you for reasonable costs associated with producing the *requested* information. If that amount will exceed \$50, please inform us before you incur the costs.

You may contact us when the records have been compiled, or if you would like to discuss ways that we can narrow the request to expedite processing. However, if we do not hear from you within thirty (30) days, we will deem the request denied. *See* A.R.S. § 39-121.01(D)(1) (public records must be furnished “promptly”); A.R.S. § 39-121.01(E)(a) request for public records is “deemed denied if a custodian fails to promptly respond to a

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<sup>3</sup> We seek only existing records and are not requesting that the agency create new records.

<sup>4</sup> Including but not limited to the Shiloh, Southwest Key, and Tumbleweed Office of Refugee Resettlement (ORR) shelters.

request for production”); *see also Phoenix New Times L.L.C. v. Arpaio*, 217 Ariz. 533, 538, 177 P.3d 275, 280 (Ct. App. 2008) (“[T]o the extent the party does not receive a prompt response, ‘[a]ccess to a public record is deemed denied”).

Thank you very much for your prompt attention. Should you have any questions, please contact me by phone at (520) 344-7857 or by email at [jlyall@acluaz.org](mailto:jlyall@acluaz.org).

Sincerely,

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

James Lyall  
Staff Attorney  
ACLU of Arizona  
PO Box 1529  
Tucson, AZ 85702  
(520) 344-7857  
[jlyall@acluaz.org](mailto:jlyall@acluaz.org)

Enclosure: ACLU December 3, 2014 Freedom of Information Act (FOIA) request

Copy with enclosure to:

Jennifer Bowser  
Public Information Officer  
Arizona Department of Child Safety  
1717 West Jefferson S/CO05A  
Phoenix, Arizona 85007  
[jbowser@azdjc.gov](mailto:jbowser@azdjc.gov)

**ACLU December 3, 2014**  
**Freedom of Information Act**  
**(FOIA) request**



*The ACLU's Border Litigation Project investigates, documents, and litigates civil and human rights violations in the U.S.-Mexico border region.*

December 3, 2014

*VIA ELECTRONIC AND CERTIFIED U.S. MAIL*

Karen Neuman  
Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive, SW, Building 410  
Stop – 0665  
Washington, DC 20528-0655  
Email: [foia@dhs.gov](mailto:foia@dhs.gov)

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

To Whom This May Concern:

This letter is a request for records (“Request”) 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 *et seq.* (Department of Homeland Security, Disclosure of Records and Information). The Request is submitted by the American Civil Liberties Union Foundation of Arizona and the American Civil Liberties Union Foundation of San Diego and Imperial Counties (collectively, “ACLU” or “Requesters”).<sup>1</sup>

Requesters seek the disclosure of records related to abuse and mistreatment of children in the custody of U.S. Customs and Border Protection (“CBP”) and its sub-agency, the U.S. Border Patrol.

**BACKGROUND**

Abuse and mistreatment of children in Border Patrol custody has been documented consistently for years. Advocates and academics have issued numerous reports and filed hundreds of complaints with Department of Homeland Security (“DHS”) oversight bodies describing Border Patrol agents’ abusive treatment of children, as well as the inhumane

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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.

conditions of confinement experienced by both children and adults in Border Patrol detention facilities. To cite just a few recent examples:

- A 2014 policy brief based on interviews with 224 children documented extremely cold temperatures in detention facilities and found that more than half of the children interviewed had been placed in three-point shackles (affixed at the wrists, waist, and ankles).<sup>2</sup>
- A 2012 report based on interviews with 151 children found nearly all reporting mistreatment suffered while in Border Patrol custody, including verbal and physical abuse by agents and destruction of personal property.<sup>3</sup>
- A 2011 report based in part on interviews with 801 children documented extremely cold temperatures in detention facilities, severe overcrowding, unsanitary detention conditions, verbal and physical abuse, and denial of food, water and medical treatment.<sup>4</sup>
- A 2009 report based on interviews with 124 unaccompanied children found: eighty-five percent of the children had been held in excessively cold rooms; thirty-three percent received food less than three times per day; twenty-five percent were not offered water; and roughly half were denied the opportunity to call an attorney, consular official, or family member.<sup>5</sup>
- A 2008 report based on interviews with more than 200 children documented overcrowded CBP detention facilities where children were made to sleep on cold floors with minimal or no bedding, denied adequate food and water, and refused access to showers and telephones for days on end.<sup>6</sup> The report also included multiple accounts of verbal and physical abuse by Border Patrol agents.<sup>7</sup>

On June 11, 2014, the ACLU and partner organizations submitted an administrative complaint on behalf of 116 children to DHS oversight agencies, alleging abuse and mistreatment of children in Border Patrol custody.<sup>8</sup> Approximately one in four of these children reported

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<sup>2</sup> NATIONAL IMMIGRANT JUSTICE CENTER, UNACCOMPANIED IMMIGRANT CHILDREN: A POLICY BRIEF 3 (2014), available at <http://bit.ly/1o2RT4B>.

<sup>3</sup> WOMEN'S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 22 (2012), available at <http://bit.ly/1idNuUo>.

<sup>4</sup> NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY 8 (2011), available at <http://bit.ly/1HfBwIz>.

<sup>5</sup> FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, SEEKING PROTECTION, ENDURING PROSECUTION: THE TREATMENT AND ABUSE OF UNACCOMPANIED UNDOCUMENTED CHILDREN IN SHORT-TERM IMMIGRATION DETENTION 7–14 (2009), available at <http://bit.ly/1prCKx>.

<sup>6</sup> WOMEN'S REFUGEE COMMISSION, HALFWAY HOME: UNACCOMPANIED IMMIGRANT CHILDREN IN IMMIGRATION CUSTODY 9–11 (2008), available at <http://bit.ly/1hvPc8M>.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> See AMERICAN CIVIL LIBERTIES UNION ET AL., RE: SYSTEMIC ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION 2 (2014), available at <http://bit.ly/XqyyOt>.

physical abuse, including sexual assault, beatings, and the use of stress positions by Border Patrol agents. More than half of the children reported various forms of verbal abuse, including death threats. Roughly the same number reported denial of medical care, including several who eventually required hospitalization. Many reported being detained without blankets and having to sleep on the floors of unsanitary, overcrowded, and frigid cells. More than eighty percent described inadequate provision of food and water, while thirty percent reported that Border Patrol agents had confiscated their money and/or personal belongings and had not returned them. Many children reported being chained in three-point shackles during transport.

In response to the administrative complaint, CBP leadership and DHS' Office of Inspector General ("OIG") initially indicated they would conduct a thorough investigation of these allegations.<sup>9</sup> CBP Commissioner R. Gil Kerlikowske, however, immediately began to downplay and even to mischaracterize the allegations.<sup>10</sup> Meanwhile, DHS OIG has issued three "interim reports" concluding that detention conditions and "Border Patrol capacity to provide care" have "improved," while attributing at least some of the unsanitary conditions reported to the children themselves.<sup>11</sup> In response, the American Immigration Council commented, "Considering the extensive documentation of abusive conditions in [Border Patrol detention facilities]—which include the testimonials of those held in these facilities—it is difficult to take the OIG reports seriously."<sup>12</sup>

Notwithstanding its acknowledgment of "recurring problems" in CBP detention facilities,<sup>13</sup> on October 6, 2014—less than four months after it first announced its intent to launch

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<sup>9</sup> See *Unaccompanied Minor Children*, CSPAN, June 12, 2014, <http://cs.pn/YWfJEr>.

<sup>10</sup> See, e.g., Stephen Dinan, *Border Patrol Changing Diapers, Heating Baby Formula for Surge of Children*, WASH. TIMES, June 13, 2014, available at <http://bit.ly/1uXOsLz> ("I think I've pretty much demonstrated my commitment to having complaints investigated, my commitment to making the information as a result of those investigations known . . . I would tell you in reading a few of the complaints, the lack of specificity, particularly when where, what station, let alone the names of any individual, is extremely troubling."); Steve Inskip, *Transcript: Commissioner Kerlikowske's Full Interview*, NPR, July 18, 2014, available at <http://n.pr/1s9pEDh> ("What I did not see, other than several complaints of offensive language, I didn't see complaints of assault, or use of force. I didn't see complaints where the children or the women said they had been assaulted or hurt or sexually assaulted. But I think the complaints about the facility are absolutely spot-on.").

<sup>11</sup> See Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth on Oversight of Unaccompanied Alien Children 2 (Oct. 2, 2014), available at <http://1.usa.gov/1t3dyfm> ("Many detainees do not follow up with recommended medical care for themselves or their children"); Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth on Oversight of Unaccompanied Alien Children 2 (Aug. 28, 2014), available at <http://1.usa.gov/XOqAzc> ("[Unaccompanied child] and family unit illnesses and unfamiliarity with bathroom facilities resulted in unsanitary conditions and exposure to human waste in some holding facilities."); see also Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth on Oversight of Unaccompanied Alien Children (July 30, 2014), available at <http://1.usa.gov/1r3Myd1>.

<sup>12</sup> Emily Creighton, *Inspector General Falls Short in Documenting Border Detention Conditions*, AM. IMMIGR. COUNCIL BLOG (Sept. 16, 2014) <http://bit.ly/1r3VS0e>.

<sup>13</sup> Press Release, Department of Homeland Security Office of Inspector General, Improvements Continue at Detention Centers (Oct. 6, 2014), available at <http://1.usa.gov/1oKw2Kq>.



a full investigation of the inhumane conditions and abuse—DHS OIG announced it would be “curtailing routine inspections.”

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The years of persistent allegations of child abuse in CBP detention facilities suggest that CBP policies and practices are plagued by systemic problems. Equally troubling is the apparent failure of DHS oversight agencies to take corrective action and ensure agent accountability following instances of child abuse. Over the past few years, DHS oversight bodies have repeatedly ignored administrative complaints documenting hundreds of individual cases of CBP’s mistreatment of children. For example, from 2009 to 2011, the non-governmental organization No More Deaths and its partner organizations filed seventy-five complaints with DHS oversight agencies regarding Border Patrol abuses; the complainants did not receive a single response.<sup>14</sup>

Child advocates have also filed numerous complaints with DHS, only to be ignored outright or, at best, dismissed out of hand. Advocates report that, even when investigations have been conducted, those investigations lack transparency and often involve interviews of children characterized by inappropriate and even hostile interview techniques. Despite the overwhelming number of alleged violations, few Border Patrol agents are known to have faced any disciplinary action for abusing children in custody.<sup>15</sup>

By failing to meaningfully investigate or otherwise respond to consistent reports of systemic abuse, DHS and CBP officials have demonstrated a continuing disregard for the civil and human rights of children in their custody, and may have violated state and federal child abuse reporting laws.

### **REQUESTERS**

The ACLU is a national, non-partisan organization of more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide. The ACLU is dedicated to the defense of civil rights and civil liberties and to holding the U.S. government accountable to principles of due process and of the U.S. Constitution in general. The ACLU of Arizona and the ACLU of San Diego & Imperial Counties (“ACLU-SDIC”) are two of the ACLU’s local affiliates.

### **DEFINITIONS**

“Records”—all records or communications preserved in electronic or written form, including but not limited to: agreements; correspondence; documents; letters; notes; messages; emails; faxes; data; videotapes; audio tapes; files; forms; logs; records; guidance; guidelines; evaluations; audits; investigations; reviews; studies; reports; critiques; analysis; internal

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<sup>14</sup> See NO MORE DEATHS, A CULTURE OF CRUELTY, *supra* note 4, at 8.

<sup>15</sup> See Brian Bennett and Cindy Carcamo, *Border Patrol Agent Charged in Assault on 14-Year-Old Boy*, L.A. TIMES, Sept. 25, 2014, available at <http://lat.ms/lrGH1Ii>.



memoranda; legal opinions; orders; guidance; directives; training materials; criteria; standards; specifications; rules; instructions; manuals; advisories; protocols; procedures; policies; or other communications.<sup>16</sup>

“DHS” includes any sub-agency within the Department of Homeland Security, including Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and U.S. Border Patrol, as well as all DHS oversight agencies (including the Office of Inspector General, CBP Internal Affairs, ICE Office of Professional Responsibility, and the Office of Civil Rights and Civil Liberties).

“Child” or “Children” means any individual or individuals under the age of eighteen detained by CBP or U.S. Border Patrol.

### **RECORDS REQUESTED**

Requesters seek disclosure of DHS Records pertaining to alleged or actual mistreatment of children in DHS custody from January 1, 2009 to the present, including any such Records held by Border Patrol, CBP, or any other DHS component agencies, to include at least:

1. All Records relating to any alleged or actual verbal, physical, and/or sexual abuse of children in DHS custody, including, but not limited to, any incidents resulting in hospitalization.
2. All Records related to DHS compliance with child abuse reporting requirements under state and federal law, including but not limited to the Victims of Child Abuse Act of 1990; 42 U.S.C. § 13031; 8 C.F.R. § 81.2–81.3.<sup>17</sup>
3. All Records related to DHS implementation of and compliance with the Prison Rape Elimination Act (“PREA”).
4. All Records relating to
  - a. complaints of alleged or actual verbal, physical, and/or sexual abuse of children in DHS custody, and

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<sup>16</sup> **Please note:** Should any responsive Record contain the personal identifying information of any third party, Requesters ask that the agencies redact that information. This Request does *not* seek any personal or identifying information about any specific individual(s).

<sup>17</sup> According to the U.S. Department of Justice, 42 U.S.C. § 13031 “is best read to impose a reporting obligation on all persons who, while engaged in the covered professions and activities on federal lands or in federal facilities, learn of facts that give reason to suspect that child abuse has occurred, regardless of where the abuse might have occurred or where the suspected victim is cared for or resides.” *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, ASSISTANT ATTORNEY GENERAL’S MEMORANDUM FOR THE GENERAL COUNSEL, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS 5 (May 29, 2012), *available at* <http://1.usa.gov/1p2OX39>. Further, “the statute does not require a covered professional to possess knowledge of the identity of an affected child in order for the reporting duty to apply.” *Id.* at 2.

- b. complaints regarding conditions of confinement experienced by children in DHS custody submitted to any DHS entity by any person, non-governmental organization, state or federal government agency, tribal government, consular office, or any other entity, whether verbal or written, and all Records related or responding to any such complaints.
5. All Records relating to
  - a. the three interim reports regarding Oversight of Unaccompanied Alien Children prepared by DHS OIG dated July 30, 2014, August 28, 2014, and October 2, 2014;
  - b. DHS OIG's decision, announced in a press release dated October 6, 2014, that it would begin curtailing its routine inspections at detention facilities for unaccompanied children;
  - c. any investigations by any DHS entity resulting from any complaints of alleged or actual verbal, physical, and/or sexual abuse of children in DHS custody; and
  - d. any investigations by any DHS entity resulting from any complaints regarding conditions of confinement experienced by children in DHS custodyincluding all policies, protocols, or other guidelines for conducting investigations involving child complainants, and records sufficient to show the current status of all such investigations conducted from January 1, 2009 to the present.
6. All disciplinary Records resulting from alleged or actual misconduct by DHS officials involving children in DHS custody, including any violation of state or federal law or Border Patrol, CBP, and/or DHS guidelines related to the treatment of children in DHS custody or conditions of confinement experienced by children in DHS custody.

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.

### **REQUEST FOR EXPEDITED PROCESSING**

Requesters seek 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, children in CBP custody may face continuing, imminent threats to their lives or physical safety. This is particularly true given the volume of alleged abuses outlined above. Several of the reports and complaints cited above include allegations of children physically and sexually abused, denied medical care, and/or held

in life-threatening conditions. Multiple reports and complaints cite to examples of children who required hospitalization after suffering mistreatment in CBP custody.<sup>18</sup> 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).

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 a continuously updated blog, newsletters, news briefings, “Know Your Rights” documents, and other educational and informational materials that are broadly disseminated to the public.<sup>19</sup> Such material is 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 website.

The ACLU’s national website ([www.aclu.org](http://www.aclu.org)) and the sites run by the ACLU of Arizona ([www.acluaz.org](http://www.acluaz.org)) and the ACLU of San Diego ([www.aclusandiego.org](http://www.aclusandiego.org)) address civil rights and civil liberties issues in depth, provide features on civil rights and civil liberties issues in the news, and contain many thousands of documents relating to the issues on which the ACLU is focused. These websites also include features highlighting information obtained through the FOIA process.<sup>20</sup>

In addition, the ACLU publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events; this publication is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained

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<sup>18</sup> See, e.g., WOMEN’S REFUGEE COMMISSION, *HALFWAY HOME*, *supra* note 6, at 11 (“Carmen was apprehended by Border Patrol crossing the river with her five-month-old daughter Lily. She was placed into a cell with no dry clothes or blankets for her or the baby. Carmen requested something to keep the baby warm since it was so cold in the cell and all she had was wet clothing. The agents refused. By morning Lily was turning blue. Carmen begged the agents for help. Finally they looked at baby Lily and took her to the emergency room. Carmen was placed in shackles. Doctors at the emergency room said that Lily was suffering from hypothermia and that she had contracted pneumonia. They gave her antibiotics and kept her in the hospital for 24 hours. During that time Carmen was shackled and nurses were not allowed to give her any food.”).

<sup>19</sup> See, e.g., Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (Mar. 28, 2014, 12:29 PM), <http://slate.me/1jg5YXx> (describing ACLU’s efforts to broadly disseminate important civil rights-related news stories) (last visited Dec. 1, 2014).

<sup>20</sup> See, e.g., THE TORTURE DATABASE, <http://www.thetorturedatabase.org> (last visited Dec. 1, 2014); MAPPING THE FBI, <http://www.aclu.org/mappingthefbi> (last visited Dec. 1, 2014); 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 Dec. 1, 2014).

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 ACLU also regularly publishes books, “Know Your Rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *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). The ACLU further disseminates information to the public via social media platforms such as Facebook and Twitter.

Depending on the results of this request, the ACLU plans to disseminate the information it receives among the public through these kinds of publications in these kinds of channels. The ACLU is therefore an organization “primarily engaged in disseminating information” within the meaning of the statute and the relevant regulations—as has been previously recognized in FOIA litigation between the ACLU and the Department of Justice. *See, e.g., ACLU 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 of the abuse and neglect of children in CBP custody have persisted for years. As these conditions have worsened, the maltreatment of children in CBP custody and the dysfunction of DHS oversight agencies have attracted considerable, sustained media coverage and public attention in recent months.<sup>21</sup>

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<sup>21</sup> *See, e.g.,* 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>; Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion In Agency*, NPR, Aug. 28, 2014, available at <http://n.pr/1p9YST8>; Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, WASH. POST, Aug. 16, 2014, available at <http://wapo.st/1rNoBnz>; Pamela Brown and Steve Almasy, *Sexual Abuse of Minors Alleged at Border As Kids Flock Into U.S.*, CNN, June 12, 2014, available at <http://cnn.it/1v4fbXn>; 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>; Karen McVeigh, *Immigration Groups Allege Abuse of Migrant Minors by US Border Patrol*, THE GUARDIAN, June 11, 2014, available at <http://bit.ly/1tqi70g>; Arit John, *Child Migrants Claim They’re Being Abused by U.S. Border Officials*, THE WIRE, June 10, 2014, available at <http://yhoo.it/1DDYVih>; Jessica Garrison, *Exclusive: Immigrant Minors Alleged Mistreatment by U.S. Border Officials*, BUZZFEED, June 9, 2014, available at <http://bzfd.it/1pYkuHS>; Damien Cave,

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**

Requesters further seek a waiver of processing (search and review) fees because disclosure of these records is in the public interest and because the ACLU qualifies as a “representative of the news media.” 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.”); 6 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 for these reasons.

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

#### **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.

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*Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. TIMES, May 5, 2014, available at <http://nyti.ms/1BgT7fr>.

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 determine whether minors encountered, apprehended, and/or detained by CBP or the U.S. Border Patrol are treated in a manner that comports with the U.S. Constitution and other federal laws, and whether CBP personnel are properly investigated and held accountable when they fail to respect those laws.

Third, disclosure of the requested information will contribute to “the understanding of a reasonably broad audience of persons interested in the subject” of how minors in CBP custody are treated. Among other things, the ACLU intends to publish responsive records and analyze specific documents to raise public awareness of CBP’s treatment of minors, generally.

Finally, disclosure will contribute “significantly” to the public understanding of CBP and Border Patrol treatment of minors in custody. As noted, the question of minors’ treatment in CBP custody has garnered significant and sustained public and media attention, yet much remains unknown about this critical human rights issue.

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

Disclosure of the information requested is not in the Requesters’ commercial interest. Any information obtained as a result of this FOIA request will be made available to the public at no cost.

**C. The ACLU qualifies as a representative of the news media.**

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it 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. § 552(a)(4)(A)(ii)(II); *see also, e.g., National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The ACLU is a “representative of the news media” for the same reasons that it is “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); *American Civil Liberties Union v. Department 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”).<sup>22</sup> Various federal courts

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<sup>22</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee

have held that the ACLU is a “representative of the news media.” *See, e.g., Serv. Women’s Action Network v. Department of Defense*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at \*3 (D. Conn. May 14, 2012); *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).

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 (1992)).

Should a total waiver be denied, fees should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In the event a fee waiver or reduction of costs is denied, please notify us in advance if the anticipated costs associated with this Request exceed \$100.00.

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Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4).

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waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the 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.



We further expect your reply to the Request itself within twenty (20) business 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.

We reserve the right to appeal a decision to withhold any information, or to deny expedited processing or a waiver of fees.

Please furnish all responsive records to both:

ACLU of Arizona  
James Lyall  
P.O. Box 17148  
Phoenix, AZ 85011  
[jlyall@acluaz.org](mailto:jlyall@acluaz.org)

ACLU of San Diego  
Mitra Ebadolahi  
P.O. Box 87131  
San Diego, CA 92138-7131  
[mebadolahi@aclusandiego.org](mailto:mebadolahi@aclusandiego.org)

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

Thank you in advance for your assistance.

Sincerely,



James Lyall  
Staff Attorney  
ACLU of Arizona  
520.344.7857



Mitra Ebadolahi  
Staff Attorney  
ACLU of San Diego and  
Imperial Counties  
619.398.4187