



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Arizona



June 1, 2020

Via Electronic Mail

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229
admin@foiaonline.gov

Re: Freedom of Information Act (FOIA) Request

To Whom It May Concern:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552. This request is submitted on behalf of the American Civil Liberties Union of Arizona and the ACLU Border Rights Center (“ACLU”).¹ The ACLU seeks information regarding U.S. Customs and Border Protection’s (CBP) enforcement actions at sensitive locations² in the Tucson Sector since implementation of the agency’s 2013 memorandum regarding “enforcement actions at or near certain community locations.”³

¹ The ACLU Foundation of Arizona, a 501(c)(3) organization, is dedicated to protecting and defending the individual rights and liberties guaranteed by the Constitution and laws. The ACLU monitors government conduct, provides free legal representation in civil rights and civil liberties cases, educates the public about their rights and liberties and abuses of power, and provides analyses of government activities and their civil rights implications. The ACLU Border Rights Center, based out of the ACLU of Texas, is dedicated to standing with border communities to defend and protect United States’ constitutional guarantees of equality and justice for all families to live freely, safely and with dignity.

² U.S. Customs and Border Protection, “What does the Department of Homeland Security mean by the term “sensitive location”?” <https://www.cbp.gov/faqs/what-does-department-homeland-security-mean-term-%E2%80%99sensitive-location%E2%80%9D>

³ U.S. Customs and Border Protection Memorandum regarding U.S. Customs and Border

I. Background

On January 18, 2013, then CBP Deputy Commissioner David V. Aguilar, issued a memorandum establishing a policy regarding “the presence of [CBP] officers and agents conducting enforcement activities at or near schools, places of worship, and other community locations” (“Sensitive Locations Memo”). The policy recognizes that particular care is needed when conducting enforcement activities at or near certain sensitive locations. The policy instructs officers to consult supervisors prior to taking action and consider alternative measures to avoid disturbances at such locations. If CBP activities are likely to lead to an apprehension near a sensitive location, written approval is required from “Chief Patrol Agent, Director of Field Operations, Director of Air and Marine Operations or the Internal Affairs Special Agent in Charge. If apprehensions are not likely, “[t]he Deputy to these offices may approve the inspection of records, preliminary investigative activities, and similar activities at these locations.”

It appears that Border Patrol continues to maintain a problematic presence at sensitive locations that could potentially deter undocumented individuals from seeking care or accessing other essential civic institutions. For example, in 2019 doctors reported Border Patrol agents conspicuously deployed at hospital entrances and agents pressuring doctors to discharge patients quickly for further detention.⁴

On April 13, 2020, the ACLU and 20 other Arizona based organizations sent a letter to Roy D. Villareal, Chief Patrol Agent for the Tucson Sector, U.S. Border Patrol, requesting the immediate suspension of Border Patrol enforcement during the COVID-19 pandemic.⁵ The impetus for this letter was concerns raised by community members after Border Patrol was observed at a drive-thru COVID-19 testing site.⁶ In response to the letter of April 13, 2020, Chief Villareal, issued a letter dated April 17, 2020, stating “[t]he 2013 CBP memo regarding enforcement activities at sensitive locations [] remains in effect.”⁷

II. Requested Records

By this request, the ACLU seeks the following records. Unless otherwise indicated, the relevant time period for this request is January 1, 2013 to the date of this request:

Protection Enforcement Actions at or Near Certain Community Locations, Jan. 18, 2013, https://foiarr.cbp.gov/docs/Policies_and_Procedures/2013/826326181_1251/1302211111_CBP_Enforcement_Actions_at_or_Near_Certain_Community_Locations_%7BSigned_M.pdf.

⁴ Sheri Fink, Migrants in Custody at Hospitals Are Treated Like Felons, Doctors Say, N.Y. TIMES, June 10, 2019, <https://www.nytimes.com/2019/06/10/us/border-migrants-medical-health-doctors.html>.

⁵ Letter regarding CBP’s failure to suspend interior enforcement, particularly at sensitive locations, in light of the COVID-19 pandemic (April 13, 2020), https://www.acluaz.org/sites/default/files/2020.04.13_cbp_sensitive_location_letter.pdf.

⁶ Liliana Soto, Border Patrol presence at COVID-19 drive-thru raises questions, ABC 15 Arizona (April 16, 2020), <https://www.abc15.com/news/region-central-southern-az/tucson/border-patrol-presence-at-covid-19-drive-thrus-raises-questions>.

⁷ Letter on file at the ACLU of Arizona.

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1. The most recent version of the U.S. CBP “Sensitive Locations” memo, as well as all prior versions of such memo that are or were in effect during the request period, as well as any updates, amendments, or attachments thereto.
2. All records⁸, including but not limited to PowerPoint presentations and handouts, displayed or distributed to Border Patrol staff in connection with any training provided regarding the “Sensitive Locations” memo.
3. Databases, spreadsheets, lists, and other data compilations indicating the following:
 - a. number of U.S. Border Patrol enforcement activities, in the Tucson Sector undertaken at any and all of the sensitive locations listed in the “Sensitive Locations” memo since January 2013;
 - b. number of arrests and/ or detentions made by U.S. Border Patrol in the Tucson Sector at any and all of the sensitive locations listed in “Sensitive Locations” memo since January 2013;
 - c. number of times approval was sought by U.S. Border Patrol for enforcement actions in the Tucson Sector at any and all of the sensitive locations listed in the “Sensitive Locations” memo since January 2013.
4. All communications received from or transmitted between Tucson Sector Border Patrol agents and supervisors regarding enforcement actions at or near any of the sensitive locations listed in the “Sensitive Locations” memo including any assessment of appropriateness of the proposed action and/or alternative measures considered.
5. All records received from or transmitted to the Tucson Sector Chief Patrol Agent, Director of Field Operations, Director of Air and Marine Operations, and/or the Internal Affairs Special Agent, regarding enforcement actions or investigative activities that are likely to lead to an apprehension at or near the locations listed above in request (1).
6. All records received from or transmitted to the Tucson Sector Deputy Chief Patrol Agent, Deputy Director of Field Operations, Deputy Director of Air and Marine Operations, and/or the Deputy Internal Affairs Special Agent, regarding approval of the inspection of records, preliminary investigative activities, and/or similar activities where apprehensions are not likely to be made at or near the locations listed above in request (1).

⁸ The term “records” as used in this request and in request number 2 includes, but is not limited to, all communications, data, and information preserved in physical or electronic (digital) formats, including but not limited to advisories, agreements, analyses, audio, contracts, correspondence, documents, e-mails, evaluations, faxes, files, guidelines, instructions, memoranda, memoranda of understanding, minutes of meetings or calls, notes, orders, policies, procedures, protocols, regulations, reports, rules, social-media posts, studies, technical manuals, text messages (SMS or other platforms), training manuals, or video.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552 (a)(6)(E).⁹ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. 552(a)(6)(E)(v)(II).

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).¹⁰ Specifically, the requested records are needed to ensure transparency over Border Patrol enforcement activities in sensitive locations and assuage public fears amidst a global pandemic that makes access to these locations even more necessary.

Both the ACLU of Arizona and 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”).¹¹ We do this work alone and with our national partners and allies. The ACLU Border Rights 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.¹² The ACLU of Texas, which houses the Border Rights Center also 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.¹³ The ACLU of Arizona regularly creates and disseminates presentations, reports, articles, interviews, testimony, social media, and blog posts to educate the public about the activities of US federal and Arizona state officials.¹⁴

⁹ *See also* 6 C.F.R. § 5.5(e)(1).

¹⁰ *See also* 6 C.F.R. § 5.5(e)(1)(ii).

¹¹ 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).

¹² *See generally* Immigrant Rights, ACLU Tex., available at <https://www.aclutx.org/en/issues/immigrants-rights>.

¹³ *See generally* Know Your Rights, ACLU Tex., available at <https://www.aclutx.org/en/know-your-rights/>.

¹⁴ *See generally* Campaigns, ACLU AZ., available at: <https://www.acluaz.org/en/campaigns>

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Pursuant to the applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); C.F.R. § 5.5(e)(4).

In addition, ACLU is entitled to a waiver or reduction of fees because 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 disclosure of the information is not primarily in the commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Local and national outlets have reported on Border Patrol activities near hospitals and other sensitive locations and the public health concerns that they engender.¹⁵ Border Patrol's activities near sensitive locations and adherence to their own policy to protect against inappropriate enforcement actions are the source of considerable public interest. Accordingly, transparency regarding Border Patrol's policy is vital to the public interest.

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific FOIA exemptions. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or to deny a fee waiver. Please provide documents in digital form wherever possible.

Thank you for your prompt attention to this matter. Please furnish the applicable records to the below signed.

Sincerely,

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¹⁵ *See* *ACLU asks Border Patrol to stop arrests near hospitals, sensitive locations*, AZ MIRROR, April 16, 2020, available at: <https://www.azmirror.com/blog/aclu-asks-border-patrol-to-stop-arrests-near-hospitals-sensitive-locations/>; *See also* footnote 4, *supra*.