



July 20, 2016

Commissioner R. Gil Kerlikowske
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Washington, DC 20229

Re: Recommendations to Improve Current FOIA Practices at CBP

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Dear Commissioner Kerlikowske:

The ACLU respectfully submits this letter to raise concerns regarding current Freedom of Information Act (FOIA) practices within U.S. Customs and Border Protection (CBP) and to provide recommended changes that would increase accessibility and improve transparency within the agency. FOIA turned 50 on July 4th, and it would be an important component of your legacy – and this administration’s commitment to open government – to implement changes that improve CBP’s substandard FOIA responsiveness.

I. Current State of CBP FOIA Practices

The public is routinely denied access to critical information about CBP activities. Extensive delays, inappropriate denials, and non-responses have resulted in costly and lengthy litigation and have added to the FOIA backlog within CBP. Although CBP has made efforts to reduce the backlog, numerous problems still exist. *Often, FOIA requesters receive no response whatsoever.* Those who do receive a response are frequently told (erroneously) that no records exist, or they are provided with incomplete responses and/or overbroad and unlawful redactions that are contrary to the FOIA statute, case law, and implementing agency regulations.

CBP lags behind other DHS components in FOIA public access

Although CBP has improved its large FOIA backlog (which has declined from 34,408 pending requests in FY14 to 9,208 at the end of FY15), its

FOIA practices still need considerable improvement.¹ Compared to other Department of Homeland Security (DHS) components, CBP has an above-average rate of request denials based on claims that no responsive records exist: over one-third of requests generate this response.² Yet, it has been the ACLU's experience that when such denials are administratively appealed, records responsive to the original request are located. Of the 1,735 FOIA appeals submitted to CBP in FY15 in which the agency initially denied full or partial release of the requested information, 46% were completely (622) or partially (150) reversed or remanded on appeal, with instructions to FOIA officers to provide the originally requested information.³ CBP has the highest number of complete reversals/remands of all DHS components.⁴

Based on its own reporting, not only does CBP appear to deny FOIA requests at an unusually high rate, but the processing time for such requests is also the longest of all DHS components. For all "complex" requests,⁵ the most common request type submitted by the ACLU and the types discussed below, CBP has a median processing time of 236 days. In comparison, Immigration and Customs Enforcement's (ICE) processing time for complex requests is 48 days.⁶ For complex requests where information *is* released, the median increases to 274 days, the highest of all DHS components.⁷ In FY15, more than half of complex requests took CBP more than 200 days to respond to and, of those requests, two-thirds took more than 300 days.⁸

In many cases, it has been the ACLU's experience that *no response is ever provided*, and information is only obtained when litigation is pursued. This is especially concerning as most requesters lack the resources and expertise necessary to pursue federal litigation to obtain a response to their FOIA request. The FOIA statute does not limit records production to those entities that have the resources or knowledge to pursue litigation, but is rather a vital tool of accessibility for the general public.

Unlike its counterparts, including United States Citizenship and Immigration Services (USCIS), the U.S. Secret Service (USSS), the Federal Emergency Management Agency (FEMA), ICE, and DHS's Office of Inspector General (OIG), CBP does not have a process or system in place to make proactive disclosures when it can be anticipated that there will be public interest in the

¹ DHS PRIVACY OFFICE, 2015 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES ii (Feb. 2016), <https://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-report-fy-2015.pdf> [hereinafter 2015 FOIA REPORT].

² *Id.* at 6.

³ *Id.* at 8.

⁴ *Id.* at 8-9.

⁵ A complex request is defined as a request that typically seeks a high volume of material or requires additional steps to process such as the need to search for records in multiple locations. Glossary, FOIA.GOV, <http://www.foia.gov/glossary.html>.

⁶ 2015 FOIA REPORT, *supra* note 1, at 12.

⁷ *Id.*

⁸ *Id.* at 13.

information or that the information might be frequently requested. For example, ICE has a process by which frequently-requested agency reports are immediately posted online once they are finalized.⁹ DHS OIG posts all final audit and inspection reports to its FOIA reading room website and also has implemented a practice of posting records online any time it has received three or more FOIA requests seeking those records.¹⁰ No public record of similar CBP protocols on proactive disclosures exists and we are eager to learn CBP's plans for complying with Congress' new mandate to "make available for public inspection in an electronic format" records "that have been requested 3 or more times."¹¹

A recurring problem when submitting FOIA requests to CBP is that in many cases no response is ever received – no confirmation of receipt, no updates on processing, and no interim responses. Months or years can pass without any communication from CBP. Given the lengthy processing times stated above, this silence from CBP often leads to the impression that nothing is being done to fulfill the FOIA request. By contrast, other DHS components, including the DHS Privacy Office, OIG, Office of Intelligence and Analysis (I&A), ICE, National Preparedness Directorate (NPD), United States Coast Guard (USCG), and USSS all send interim responses to requesters when a FOIA response results in voluminous and complex records. These components also update requesters on progress in processing the request.¹² CBP has reported no such policy.

Other DHS components have taken actions to make their FOIA systems operate efficiently and effectively, including simplifying the submission process through mobile access, improving the process for tracking, and tasking offices responsible for conducting searches, self-assessments of staffing needs, and weekly staff meetings to discuss efficiencies. The DHS Privacy Office, Transportation Security Administration (TSA), OIG, USCIS, ICE, Science and Technology (S&T), and USSS have reported steps taken to improve FOIA operations; CBP has not.¹³

In pursuit of transparency, OIG, USCIS, ICE, USSS, FEMA, S&T, and USCG have all produced discretionary FOIA releases where a FOIA exemption might otherwise apply. In FY15, CBP did not make any discretionary FOIA releases.¹⁴ CBP should work harder at identifying appropriate materials to disclose proactively.

⁹ DHS PRIVACY OFFICE, 2016 CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 24 (Mar. 2016), <https://www.dhs.gov/sites/default/files/publications/2016-chief-foia-officer-report-april-4-2016.pdf>.

¹⁰ *Id.*

¹¹ FOIA Improvement Act of 2016, Pub. L. No. 114-185 (2016).

¹² 2016 Chief FOIA Officer Report, *supra* note 9, at 47.

¹³ CBP has not publicly reported steps taken in any published reports.

¹⁴ *Id.* at 16.

The information above, taken directly from DHS's own reporting, illustrates the obstacles faced when attempting to obtain information through CBP FOIA. We urge CBP to stop lagging behind other DHS components in implementing best practices to improve the FOIA process.

II. ACLU Experience with CBP FOIA

Selected examples of recent ACLU experiences with CBP FOIA illustrate our concerns:¹⁵

- On January 23, 2014, the ACLU of Arizona submitted two FOIA requests seeking records related to Border Patrol's interior enforcement operations in the Tucson and Yuma Sectors, including relevant agency policies, stop data, and complaint records.¹⁶ After more than three months of having received no response, the ACLU filed a federal lawsuit on April 28, 2014. Following the filing and subsequent negotiations, approximately 11,000 pages of documents were produced on a rolling basis. More than one year later, however, it became apparent that CBP had not conducted an adequate search, and negotiations on the release of additional documents stalled. Litigation is pending for the release of all relevant documents requested.
- On July 3, 2014, the ACLU of San Diego and Imperial Counties and the ACLU of Southern California submitted a FOIA request to CBP and DHS seeking records related to Border Patrol's roving-patrol operations in the San Diego and El Centro Sectors, including relevant agency policies, stop data, and complaint records.¹⁷ Following the request, the ACLU received several, conflicting confirmation receipts with multiple tracking numbers via email acknowledging the FOIA request. One email stated that a request was closed due to duplication. Beyond the initial conflicting emails, the ACLU did not receive any correspondence from CBP or DHS on the substance of the FOIA request or any responsive documents. After receiving no response for over seven months, the ACLU filed a federal lawsuit in February 2015. In November 2015, after prolonged negotiations, 6,000 pages of records were produced, but more documents are expected. Litigation is pending for the release of all relevant documents requested.
- On December 3, 2014, the ACLU of Arizona and the ACLU of San Diego and Imperial Counties submitted a FOIA request to DHS and several of its components, including CBP, requesting records related to the abuse and mistreatment of children in CBP custody. After not receiving a response in the statutorily mandated time frame, the ACLU

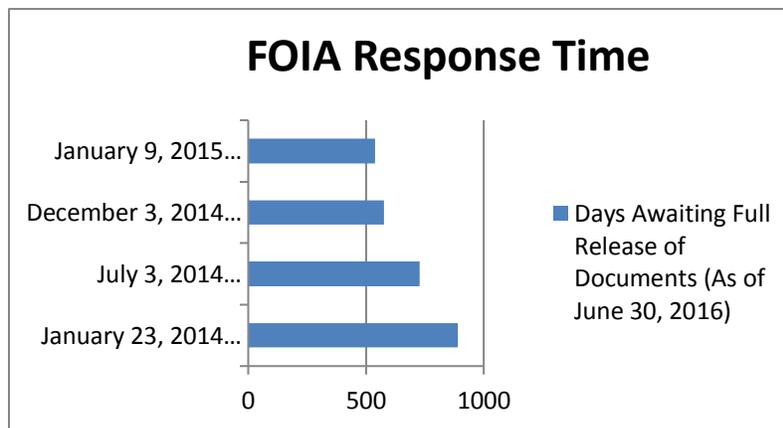
¹⁵ This is not an exhaustive list of FOIA requests submitted to CBP or DHS on behalf of the ACLU.

¹⁶ *ACLU of Arizona v. Dept. of Homeland Security* No. 4:14-cv-02052-RM-BPV (D. Ariz. filed Apr. 28, 2014), <https://holdcbpaccountable.org/2015/11/25/aclu-of-arizona-v-dhs-no-d-az-tucson-interior-enforcement-foia/>.

¹⁷ *ACLU San Diego et al. v. DHS et al.* No. 8:15-cv-00229-JLS-RNB (C.D. Cal., filed Feb 20, 2015), <https://holdcbpaccountable.org/2015/03/04/aclu-san-diego-et-al-v-dhs-et-al/>.

filed a federal lawsuit in February 2015.¹⁸ After a trickle of documents were produced, and with DHS seeking multiple extensions of production deadlines, a court ruled last month that there were no “exceptional circumstances” warranting further delay and that DHS and CBP must provide the documents by July 8, 2016. DHS and CBP did not meet this deadline, as they filed a request for extension.

- On January 9, 2015, the ACLU of San Diego and Imperial Counties filed a FOIA request for records related to the death of Steven Keith,¹⁹ who died while detained by CBP at an interior checkpoint in Southern California. CBP responded to the complaint, indicating that no records were found relating to the request. The ACLU filed an administrative appeal which resulted in CBP identifying many documents related to the initial request, including a video. CBP indicated that the records could not be released until redactions were made, which would take untold months. The ACLU inquired into the basis of the legal authority by which CBP was asserting a right to redact, but did not receive a response to that question. CBP has not provided any updates on the request since September 2015.



III. Recommendations to Improve the CBP FOIA Process

The ACLU provides the following recommendations to improve the CBP FOIA process and bring increased transparency:

¹⁸ *ACLU of Arizona, et al. v. Office of Civil Rights and Civil Liberties, DHS, et al.* No. 15-00247 (D. Ariz. filed Feb. 11, 2015), <https://holdcbpaccountable.org/2015/03/04/aclu-of-arizona-et-al-v-office-of-civil-rights-and-civil-liberties-dhs-et-al/>.

¹⁹ Massoud Hayoun, *US nationals 'under siege'; citizen dies at Border Patrol checkpoint*, AL JAZEERA AMERICA, Dec. 29, 2013, <http://america.aljazeera.com/articles/2013/12/29/us-nationals-undersiegeamidsuspiciousborderpatrolcheckpointdeath.html>.

1. Implement processes to provide interim responses to requesters and update requesters on the processing of FOIA requests, including an anticipated date of production completion.
2. Make a public commitment to prioritizing and being accountable at a leadership level for providing a timely response to all FOIA requests.
3. Address problems with the CBP FOIA online system that result in inconsistent receipts, including incorrect duplication of requests and inconsistent email “confirmations” regarding status and closure of requests.
4. Evaluate the reasons why CBP issues a large number of initial denials of requests yet finds responsive records following administrative appeals, in order to improve proper processing of initial requests. This will save time and resources for both CBP and FOIA requesters.
5. CBP and its components, including especially the Border Patrol, should provide access to public records, including policies, complaints, records of investigation, disciplinary records, stop data, and apprehension statistics for checkpoints and roving patrols through proactive disclosures at regular intervals for all Border Patrol sectors nationwide.
6. CBP should make its Office of Professional Responsibility operations maximally transparent, including by posting its disciplinary protocols, complete use-of-force reviews with recommendations, and complaint outcomes.
7. Congress recently passed, and the President signed into law, the FOIA Improvement Act of 2016, significantly improving a requester’s ability to obtain information about government actions and decision-making. The Act amended FOIA with positive reforms, including establishing a single web portal for FOIA requests and requiring that records be available in electronic format. CBP should share its plans for these upgrades and formally commit to implementing them promptly, with follow-up.

We encourage CBP to implement these recommendations in order to improve the public’s interactions with CBP and instill your agenda of transparency and accountability within the agency. We and our open-government partners respectfully request a meeting with your responsible staff to discuss our recommendations and learn about CBP’s plans for implementation of the FOIA Improvement Act. To schedule this meeting, please contact ACLU Policy Counsel Chris Rickerd (202/675-2339); crickerd@aclu.org).

Sincerely,



Karin Johanson
Director



Chris Rickerd
Policy Counsel