

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN IMMIGRATION COUNCIL )  
1331 G Street, NW, Suite 200 )  
Washington, DC 20005-3141 )

Plaintiff, )

v. )

CASE NUMBER: )

UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY )  
Office of the General Counsel )  
20 Massachusetts Avenue, NW )  
Washington, DC 20528 )

and )

U.S. CUSTOMS AND BORDER )  
PROTECTION )  
1300 Pennsylvania Avenue, NW )  
Washington, DC 20229, )

Defendants. )

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking disclosure of records concerning the enforcement operations and activities of U.S. Customs and Border Protection ("CBP"), a component of the U.S. Department of Homeland Security ("DHS"), related to "voluntary returns" of noncitizens from the United States to their countries of origin. The American Immigration Council ("AIC") seeks declaratory, injunctive, and other appropriate relief with respect to Defendants' unlawful withholding of these records.

2. CBP has broad authority to secure the borders of the United States. To this end, CBP officers routinely admit or exclude individuals seeking entry to the United States, make arrests, issue charging documents, and detain noncitizens. CBP officers also frequently manage the “voluntary return” of noncitizens who are present in the United States in violation of the immigration laws. Voluntary return (also known as “administrative voluntary departure”) is a procedure whereby a CBP officer permits a noncitizen to voluntarily depart the United States at his or her own expense in lieu of being subject to formal removal proceedings. *See* 8 U.S.C. § 1229c(a). Implementing regulations provide that a noncitizen may be granted voluntary return to his or her country of origin after conceding unlawful presence in the United States and knowingly and voluntarily waiving the right to contest removal. *See* 8 C.F.R. §§ 103.2(a)(1), 236.3(f)-(g), 240.25; Forms I-826 and I-770, attached hereto as Exhibit A.

3. Based upon reports from immigration advocates, CBP officers do not always provide noncitizens with information regarding the consequences of accepting administrative voluntary departure and in some cases even compel them to “agree” to “voluntarily” depart. These practices have profound adverse consequences. Some of the individuals subject to voluntary returns are entitled to lawfully remain in the United States or are eligible for immigration relief. By opting for voluntary return, noncitizens may relinquish their claims for relief and/or become barred from lawfully reentering the United States for up to ten years. By effecting “voluntary” returns without informed consent, CBP deprives noncitizens of

the critical right to contest removability and seek lawful status in the United States through mechanisms that Congress has created.

4. DHS reports that CBP manages more than 400,000 voluntary returns each year. Despite the pervasive role voluntary return plays in its immigration enforcement activities, CBP is notorious for its lack of transparency on this issue. As a result, in June 2011 AIC submitted a Freedom of Information Act ("FOIA") request to CBP seeking records regarding voluntary return. CBP's failure to turn over the requested records violates the FOIA and is impeding AIC's efforts to educate the public regarding CBP enforcement operations in general and to educate the immigration bar regarding CBP's voluntary return practices in particular. CBP also is hindering AIC's ability to effectively advocate for justice and fairness for noncitizens subject to these practices.

#### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. This Court has jurisdiction to grant declaratory and further necessary or proper relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et. seq.*

6. Venue properly rests with this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff AIC's principal place of business is in the District of Columbia.

7. Plaintiff AIC has exhausted any and all administrative remedies in connection with its FOIA request.

PARTIES

8. Plaintiff AIC is a nonprofit organization with its principal place of business at 1331 G Street, NW, Suite 200, in Washington DC. Founded in 1987, AIC's mission is to educate the American public about immigrants' contributions to American society, to promote sensible and humane immigration policy, and to advocate for the just and equitable enforcement of the immigration laws. AIC's Immigration Policy Center ("IPC") and Legal Action Center ("LAC") help carry out this mission by reaching out to the public and to attorneys practicing in the immigration arena to promote a better understanding of immigration law, policy and practice. The IPC targets policymakers, the media, and advocates using a range of publications, new media, and presentations to inform the public debate on immigration. The LAC undertakes administrative advocacy, impact litigation, and education to advance the fair administration of the immigration laws.

9. Defendant DHS is a department of the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws. DHS has possession and control over the records sought by AIC.

10. Defendant CBP is a component of DHS and is an agency within the meaning of 5 U.S.C. § 552(f). Among other duties, CBP is responsible for enforcing immigration laws at and between ports of entry to the United States and managing voluntary returns of noncitizens from the United States to their countries of origin pursuant to 8 U.S.C. § 1229c(a) and its implementing regulations. CBP has possession and control over the records sought by AIC.

## STATEMENT OF FACTS

### A. AIC's FOIA Request

11. On June 15, 2011, AIC submitted a FOIA request to CBP seeking:

[A]ny and all records that were prepared, received, transmitted, collected, and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection (CBP) that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present. For purposes of this request, the term "voluntary returns" shall encompass grants of voluntary departure prior to the initiation of removal proceedings pursuant to 8 U.S.C. § 1229c(a).

("AIC's FOIA Request"). A copy of AIC's FOIA Request is attached hereto as Exhibit B.

12. AIC's FOIA Request identified fourteen non-exclusive categories of records that the request encompassed. In summary, parts one through ten indicated these records included DHS and CBP guidance, guidelines, directives, rules, policies, procedures, instructions, criteria, standards, agreements, correspondence, communications, and training materials concerning voluntary returns. Related topics such as arrest and detention, questioning and processing of apprehended individuals, coercive tactics by agents, eligibility for voluntary return, and consent and waivers related to voluntary return also were covered. *See* Exhibit B at 1-2. Parts eleven through fourteen specified that the requested records included documents related to complaints and investigations regarding potential misconduct, coercive tactics and mistreatment of apprehended individuals by DHS or CBP agents within 100 miles of the U.S.-Mexico border. *See* Exhibit B at 2-3.

13. Each part of AIC's FOIA Request reasonably described the records sought and provided sufficient information for CBP to conduct a reasonable search for documents responsive to the request, as required by 5 U.S.C. § 552(a)(3)(A). *See* Exhibit B at 1-3 (describing, in detail, the records sought).

14. AIC's FOIA request also sought a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *See* Exhibit B at 3-5.

15. On August 3, 2011, CBP responded to AIC's FOIA Request. A copy of CBP's August 3, 2011 response letter is attached hereto as Exhibit C.

16. CBP responded to parts one through ten of AIC's FOIA Request by providing a total of two documents, comprising four pages of records – a 2009 memorandum entitled "Juvenile Processing Guidance" and a chart listing, by country, the number of voluntary returns completed by CBP from January 2009 to April 2011. *See* Exhibit C at 4-7.

17. CBP also stated that it would not conduct a search for records responsive to parts eleven through fourteen of AIC's FOIA Request. Instead, CBP indicated that it was "unable to respond to parts 11 through 14" of AIC's FOIA Request and considered these parts "unperfected." *See* Exhibit C at 2. CBP gave three reasons for this characterization: (1) the "term 'misconduct' as used by CBP applies to all incidents that are a violation of the rules and regulations of CBP" and AIC was not sufficiently specific as to the "type of misconduct [it was] interested in"; (2) reports are "primarily retrieved via name, date of birth, SSN or other personal identifiers specific to the employee," and responsive records could not be retrieved

unless AIC provided specific names of individuals involved in responsive reports; and (3) written consent is required from those individuals “involved in [responsive] reports...per third party privacy laws.” *See id.*

18. CBP’s response to AIC’s FOIA Request did not include any information about the manner of the agency’s search for responsive records and did not seek to explain how a reasonable search for responsive records could have located only the two documents described in paragraph 16 above. *See Exhibit C at 1-3.* CBP also did not assert that any responsive records were withheld because they were subject to exemptions under FOIA. *See id.*

19. CBP’s response to AIC’s FOIA Request did not address AIC’s request for a fee waiver. *See id.*

#### **B. AIC’s Administrative Appeal**

20. On September 26, 2011, AIC timely filed an administrative appeal of the decision on AIC’s FOIA Request. A copy of AIC’s September 26, 2011 appeal letter is attached hereto as Exhibit D.

21. In the appeal letter AIC asserted that CBP did not conduct an adequate search for records responsive to AIC’s FOIA Request and did not produce all responsive, non-exempt information in its possession that was not already in the public domain. *See Exhibit D at 4-7.*

22. AIC also contested CBP’s claim that parts eleven through fourteen of AIC’s FOIA Request were unperfected and indicated that 5 U.S.C. § 552(a)(3)(A) required CBP to search for records relevant to these parts of AIC’s FOIA Request as set forth in the original request. *See Exhibit D at 5-6.* Specifically, AIC

demonstrated that it had sufficiently described the records sought in parts eleven through fourteen by citing to parts of the original FOIA Request that limited and defined the term "misconduct." *See id.* AIC also indicated that even if common search parameters would not uncover incident reports, CBP still was obligated to search for responsive records since FOIA §552(a)(3)(D) defines a reasonable search to include both manual and automated review, and publicly available records showed that the number of relevant documents was small enough for CBP to search manually without undue burden. *See Exhibit D at 6. See also Department of Homeland Security, Data on Complaints Received* (January 28, 2011), [http://www.dhs.gov/xabout/structure/gc\\_1280851127243.shtm](http://www.dhs.gov/xabout/structure/gc_1280851127243.shtm) (DHS statistics showing that only 113 complaints were filed against CBP from 2009 to 2010, demonstrating the small universe of documents potentially subject to manual review).

23. AIC further indicated, regarding documents CBP claimed were withheld due to "third party privacy laws," that 5 U.S.C. § 552(b) required CBP to produce the relevant portions of any such records with material subject to a FOIA exemption redacted. *See Exhibit D at 6-7.*

24. On October 13, 2011, CBP acknowledged receipt of AIC's appeal, indicating that it had been assigned to the FOIA Appeals, Policy and Litigation Branch. CBP's letter did not address the substance of AIC's appeal. A copy of CBP's October 13, 2011 letter is attached hereto as Exhibit E.

25. Following CBP's October 13, 2011 letter, CBP's FOIA officer contacted AIC several times to inform AIC that CBP was in the process of conducting a search for additional documents. To date, however, AIC has received neither a substantive written response from CBP regarding its FOIA appeal nor any additional documents.

**C. CBP Failed to Conduct an Adequate Search**

26. CBP and DHS have not conducted a search reasonably calculated to uncover all records responsive to AIC's FOIA request.

27. CBP acknowledged in its August 3, 2011 letter that it failed entirely to conduct a search for documents responsive to parts eleven through fourteen of AIC's FOIA Request. *See Exhibit C at 2.*

28. CBP had no basis in law to fail altogether to search for documents responsive to parts eleven through fourteen. AIC's description of the documents requested in parts eleven through fourteen was sufficient for CBP to conduct a reasonable search. CBP had a duty to carry out a manual search if an automated search was not possible. Furthermore, CBP was obligated to search for responsive documents and then determine which, if any, documents or parts thereof were exempt from production, rather than to presume such exemption without carrying out a search. *See 5 U.S.C. § 552(b)* (agency must indicate any exemptions claimed regarding withheld records and provide any "reasonably segregable portion" of records subject to an exemption).

29. Additionally, numerous facts strongly support the inference that CBP and DHS have failed to produce all available non-exempt records responsive to parts one through ten of AIC's FOIA Request.

30. DHS and CBP report that that CBP managed more than 600,000 voluntary returns in the time period governing AIC's FOIA Request. *See* Office of Immigration Statistics, U.S. Dept. of Homeland Security, *2010 Yearbook of Immigration Statistics* 94 (August 2010), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf) (reporting that 476,405 voluntary returns occurred in 2010 and most were comprised of Mexican nationals who were apprehended by CBP and returned to Mexico); Exhibit C at 7 (chart produced by CBP in response to AIC's FOIA Request indicating that CBP managed 662,485 voluntary returns of Mexican nationals between January 2009 and April 2011). Since the voluntary return program constitutes a major enforcement program that has resulted in hundreds of thousands of voluntary returns during the relevant time period, any reasonable search presumably would uncover more than two responsive records totaling four pages.

31. This presumption is supported by prior CBP FOIA productions, which show that CBP maintains numerous categories of documents related to enforcement programs, including records regarding individual removable/inadmissible noncitizens. *See e.g.*, Stanford Legal Clinic, *Deportation Without Due Process: Documents Obtained Through Freedom of Information Act Lawsuit About Federal Government's Stipulated Removal Program, Customs and Border Protection* (July

7, 2011), <http://blogs.law.stanford.edu/stipulatedremoval/2011/07/07/customs-and-border-protection> (CBP documents related to stipulated removals showing CBP maintains categories of documents including Delegation Orders, policy documents, training materials, video scripts of videos shown to apprehended individuals, deportation guidelines, and individual records).

32. Moreover, publicly available documents related to the voluntary return program and documents produced by CBP pursuant to prior FOIA litigation show that CBP and DHS are in possession of numerous responsive records beyond the two produced. For example, these documents demonstrate that the agency has policies, procedures, and other records on voluntary returns and maintains records related to individual voluntary returns. These documents include:

- The CBP field manual, which includes general instruction on enforcement operations including voluntary returns, *see* U.S. Customs and Border Protection, U.S. Dept. of Homeland Security, *U.S. Customs and Border Protection Inspector's Field Manual* (made publicly available via the internet on December 9, 2011) *available at* [http://foia.cbp.gov/index.asp?ps=1&search=&category=Manuals\\_and\\_Instructions](http://foia.cbp.gov/index.asp?ps=1&search=&category=Manuals_and_Instructions);
- Congressional testimony describing voluntary return as part of the "Consequence Delivery System" developed by CBP and ICE "designed to uniquely evaluate each subject [attempting illegal entry] and identify the ideal consequences to deliver to impede and deter further illegal activity," *see Testimony of Michael J. Fisher, Chief, United States Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security, Before H. Comm. on Homeland Security Subcomm. on Border and Maritime Security* (October 4, 2011) *available at* [http://www.cbp.gov/xp/cgov/newsroom/congressional\\_test/fisher\\_testimony.xml](http://www.cbp.gov/xp/cgov/newsroom/congressional_test/fisher_testimony.xml);
- A November 19, 2007 directive to CBP agents to document voluntary return cases in the "ENFORCE VR module, consistent with existing procedures in

the ICE Detention and Removal Manual Section 14.8,” attached hereto as Exhibit F;

- A May 8, 2006 memorandum from David V. Aguilar, Chief, U.S. Border Patrol, to all sector chief patrol agents providing procedures for the use of I-826 Notice of Rights and Request for Disposition forms in voluntary departure cases and directing CBP agents to retain executed forms, attached hereto as Exhibit G; and
- A DHS report describing voluntary return as part of the “Endgame” multi-year strategic enforcement plan that was developed following nine months of analysis by twenty-three DHS officials, *see* Bureau of Immigration and Customs Enforcement, U.S. Dept. of Homeland Security, *ENDGAME: Office of Detention and Removal Strategic Plan, 2003 – 2012: Detention and Removal Strategy for a Secure Homeland* 1-1 to 1-6 (June 27, 2003) available at <http://aclum.org/sites/all/files/education/ice/endgame.pdf>.

*See also* 8 U.S.C. § 1232 (requiring DHS, *inter alia*, to develop policies and procedures, create a repatriation pilot program, and provide a report to Congress on issues regarding unaccompanied alien children, which would include voluntary return).

33. Publicly available documents also show that CBP has records regarding allegations of misconduct related to voluntary returns and can segregate complaints against CBP agents into specific categories related to agent misconduct.

Illustrative documents include:

- Publicly available DHS data on complaints received against CBP agents, provided by year and by category, with categories that include “abuse of authority,” “discrimination,” “profiling,” and “treatment,” *see* Department of Homeland Security, *Data on Complaints Received* (January 28, 2011), [http://www.dhs.gov/xabout/structure/gc\\_1280851127243.shtm](http://www.dhs.gov/xabout/structure/gc_1280851127243.shtm);
- A DHS report providing information about two Significant Incident Reports and a CBP investigation of two unaccompanied minors in California who

alleged CBP officers coerced them into signing voluntary return documents in December 2008, *see* Office for Civil Rights and Civil Liberties, U.S. Dept. of Homeland Security, *Fiscal Year 2010 Annual and Consolidated Quarterly Reports to Congress* 63 (Sept. 20, 2011) *available at* <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2010.pdf>; and

- A December 2009 letter from the American Civil Liberties Union Foundation of San Diego & Imperial Counties (“ACLU”) and the American Friends Service Committee (“AFSC”), to CBP requesting policy changes for the use of voluntary departure for unaccompanied minors following complaints that CBP effected involuntary voluntary returns of three unaccompanied minors in San Diego in May 2009, *see* Letter from Kevin Keenan, Exec. Director, ACLU, and Pedro Rios, San Diego Area Program Director, AFSC, to Michael J. Fisher, Chief Patrol Agent, U.S. Border Patrol, San Diego Sector (Dec. 10, 2009) *available at* <http://aclusandiego.org/site/wp-content/uploads/article/Border%20Patrol%20Letter%20Requesting%20Policy%20Change%20Final-12-09.pdf>.

34. Based on the foregoing facts, CBP and DHS have wrongfully failed to make reasonable efforts to search for responsive records and to release responsive records to AIC.

### CAUSE OF ACTION

#### **Violation of the Freedom of Information Act for Failure to Disclose Responsive Records**

35. AIC repeats, alleges, and incorporates the allegations in paragraphs 1-34 as if fully set forth herein.

36. CBP is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for and to produce records responsive to AIC’s FOIA Request. AIC has a legal right to obtain such records, and no legal basis exists for CBP’s failure to search for and disclose them.

37. CBP's failures to conduct a reasonable search for records responsive to AIC's request and to disclose responsive records violates 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

38. Unless enjoined by this Court, CBP will continue to violate AIC's statutory rights to receive records under FOIA.

39. AIC is entitled to obtain the requested records immediately at no cost.

40. AIC is entitled to reasonable costs of litigation, including attorneys' fees, pursuant to 5 U.S.C. § 552(a)(4)(E).

#### **PRAYER FOR RELIEF**

WHEREFORE, AIC respectfully requests that this Court enter a judgment:

a. Declaring that Defendants' refusal to conduct a reasonable search for records responsive to AIC's FOIA Request and refusal to disclose such records violated the FOIA;

b. Ordering Defendants and any of Defendants' departments, divisions, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a reasonable search for records responsive to AIC's FOIA Request;

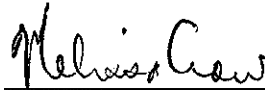
c. Enjoining Defendants and any of Defendants' departments, divisions, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from withholding records responsive to AIC's FOIA Request and ordering them to promptly produce responsive records to AIC;

d. Ordering Defendants to grant AIC a public interest fee waiver;

- e. Awarding AIC its reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and
- f. Granting all other such relief to AIC as the Court deems just and proper.

Dated: June 7, 2012

Respectfully submitted,



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*Attorneys for Plaintiff American  
Immigration Council*

Department of Homeland Security  
Bureau of Customs and Border Protection

## Notice of Rights and Request for Disposition

File No: \_\_\_\_\_

Name: \_\_\_\_\_

### NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearing, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officers from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

### REQUEST FOR DISPOSITION

\_\_\_\_\_  
Initials

☐ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States

\_\_\_\_\_  
Initials

☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

\_\_\_\_\_  
Initials

☐ I admit that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

\_\_\_\_\_  
Signature of Subject

\_\_\_\_\_  
Date

### CERTIFICATION OF SERVICE

☐ Notice read by subject

☐ Notice read to subject by \_\_\_\_\_, in the \_\_\_\_\_ language.

\_\_\_\_\_  
Name of Service Officer (Print)

\_\_\_\_\_  
Name of Interpreter (Print)

\_\_\_\_\_  
Signature of Officer

\_\_\_\_\_  
Date and Time of Service



## U.S. Department of Homeland Security

## Notice of Rights and Request for Disposition

Alien's Name: \_\_\_\_\_

FINS #: \_\_\_\_\_

A Number (If any): \_\_\_\_\_

Event No: \_\_\_\_\_

A- \_\_\_\_\_

**Your Rights.**

You have been arrested because Immigration Officers believe that you are illegally in the United States. When you are arrested in the United States you have certain rights. No one can take these rights away from you. This paper explains your rights.

**You have the right to use the telephone.**

You may call your mother or father or any other adult relative. You may call your adult friend. If you do not know how to use a telephone, the immigration agent will help you.

**You have the right to be represented by a lawyer.**

Attached to this paper is a list of lawyers who can talk to you, and help you, for free. A lawyer can fully explain all your rights to you, and can represent you at a hearing.

**You have the right to a hearing before a judge.**

The judge will decide whether you must leave or whether you may stay in the United States. If for any reason you do not want to go back to your country, or if you have any fears of returning, you should ask for a hearing before a judge. If you do not want to have a hearing before a judge, you may choose to go back to your country without a hearing.

**Reading this Notice:**

☐ I have read this notice.

☐ This notice has been read to me.

**Right to Use Telephone:**

- ☐ I have contacted my parent(s) or a legal guardian by telephone.
- ☐ I have contacted an adult friend or relative by telephone.
- ☐ I do not want to talk to anyone by telephone.

**Completion of the following is optional:**

The person contacted is: (Relationship)

The person contacted is: (Name)

**Right to be Represented by a Lawyer:**

- ☐ I have spoken with a lawyer.
- ☐ I do not want to speak with a lawyer.

**Right to a Hearing:**

- ☐ I understand my right to a hearing before a judge.

- ☐ I request a hearing before a judge.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

☐ I do not want a hearing before a judge.

I am in the United States illegally and ask that I be allowed to return to my country, which is named below.

Country: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## INSTRUCTIONS TO OFFICERS

This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents. No such person can be offered or permitted to depart voluntarily from the United States except after having been given this notice.

The required procedure distinguishes between two classes of minors.

1) The first class are those minors apprehended in the immediate vicinity of the border and who permanently reside in Canada or Mexico. These persons shall be informed that they have a right to make a telephone call to any of the persons mentioned in the notice. The purpose of this call is so that they can seek advice as to whether they should voluntarily depart or whether they should request a deportation hearing. We are required to make a record of any refusal to accept our offer of a telephone call.

2) As to all other minors, *they must not only be given access to a telephone, they must establish communication, telephonic or otherwise, with one of the persons listed in the notice* before they can be offered voluntary departure.

The DHS retains the right to decide when to allow telephone calls. The only prohibition is that the minor cannot be asked to voluntarily depart until after telephone access is provided. If the minor is not offered voluntary departure but is put into deportation proceedings by issuance of a Notice to Appear, this procedure is not necessary. It is our duty to make reasonable efforts to contact the person of the minor's choice, but after unsuccessful efforts to reach that person, we can facilitate contact with another such person. Whenever the minor elects to pursue a process, such as a call to a foreign country, which is operationally unacceptable, we can always proceed to issue a Notice to Appear.

The minor must tell the type of person that he/she talked to but need not give us that person's name or identifying information. If a minor, *of his/her own volition*, asks to contact a consular officer, this will satisfy the requirements of the notice.

The officer need not read the notice to the minor unless the minor is under 14 years of age, or unable to understand the notice. The officer must ask the minor whether he/she wanted to make a call, whether a communication was made and, if made, to whom. The officer must also verify whether the minor wanted voluntary departure or a hearing, and must sign and date the form to show this was done.

Officers are not to offer any advise to any minor as to what he/she should or should not do.

## To be completed by the Officer:

I verify that: \_\_\_\_\_ A- \_\_\_\_\_

- 1.a. ☐ The subject named was given this notice to read.
- b. ☐ I read this notice to the name subject in the following language: \_\_\_\_\_
2. ☐ I asked this subject whether he/she wanted to make a telephone call, and offered assistance in the use of the telephone.
- 3.a. ☐ The subject told me that he/she did not want to make a telephone call, or
- b. ☐ The subject told me that he/she established communication and the form was marked to indicate it;
- c. ☐ The subject was unable to establish telephone communication with the desired individual. The following number of attempts were made: 0
- 4.a. ☐ The subject requested a hearing.
- b. ☐ The subject admitted deportability and requested to return to his/her country voluntarily, without a hearing.
- 5.a. ☐ A Notice to Appear was Issued because, the subject was unable to establish contact with any of the individuals specified after making the number of attempts indicated above (Item 3 c), and after assistance to establish contact was given or offered.

\_\_\_\_\_  
Signature of Officer

\_\_\_\_\_  
Date



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COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

June 15, 2011

VIA ELECTRONIC MAIL

U.S. Customs and Border Protection  
FOIA Division  
799 9th Street, NW, Mint Annex  
Washington, DC 20229-1181  
[CBPFOIA@dhs.gov](mailto:CBPFOIA@dhs.gov)

Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officer:

The American Immigration Council (AIC) submits this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*

Request for Information

AIC requests disclosure of any and all records<sup>1</sup> that were prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection (CBP)<sup>2</sup> that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present. For purposes of this request, the term "voluntary returns" shall encompass grants of voluntary departure prior to the initiation of removal proceedings pursuant to 8 U.S.C. § 1229c(a).

The requested records include, but are not limited to, those describing, referring or relating to:

- (1) How DHS and/or CBP agents decide to stop, arrest and/or detain individuals believed to be present in the United States in violation of the immigration laws.
- (2) Guidance, guidelines, directives, rules, policies, procedures or other documents that address questioning of individuals apprehended by DHS and/or CBP agents.

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<sup>1</sup> The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, training manuals, technical specifications, training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

<sup>2</sup> The term "CBP" as used herein means CBP headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structures.

[www.americanimmigrationcouncil.org](http://www.americanimmigrationcouncil.org)

- (3) Criteria or other standards used by DHS and/or CBP agents to determine whether individuals they have apprehended are eligible for voluntary return;
- (4) Guidance, guidelines, directives, rules, policies, procedures or other documents that address means of determining that individuals apprehended by DHS and/or CBP agents knowingly and voluntarily consent to voluntary return and knowingly and voluntarily waive their right to a hearing before an immigration judge and/or to any immigration relief for which they may be eligible.
- (5) Guidance, guidelines, directives, rules, policies, procedures, instructions, memoranda or other documents regarding an agent's use of coercive tactics, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (6) Any other guidance, guidelines, directives, rules, policies, procedures or other documents that address processing of individuals apprehended by CBP for voluntary return in lieu of removal.
- (7) Guidance, guidelines, directives, rules, policies, procedures, or other documents that address means of ensuring that individuals who have signed Form I-826, Notice of Rights and Request for Disposition, depart from the United States.
- (8) Agreements, correspondence, or communications within and/or among CBP, DHS, any of their agents, agencies, sub-agencies, or offices, and/or U.S. Attorneys' Offices regarding the use of voluntary return in lieu of removal.
- (9) Training materials used to educate CBP agents about the use of voluntary return in lieu of removal.
- (10) From January 2009 to April 2011, the total number of voluntary returns of individuals to their countries of origin, the nationalities of individuals who agreed to voluntary return, and, if available, the number of voluntary returns per month.
- (11) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
- (12) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (13) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged misconduct by DHS or CBP agents within 100 miles of the

U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.

- (14) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.

We request that records existing in electronic format be provided in electronic format or on a compact disc. If any of the requested records or information is not in a succinct format, we request the opportunity to view the documents in your offices.

If any of the information requested is considered exempt under applicable law, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the information is withheld and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

Request for fee waiver

AIC requests that all fees associated with this FOIA request be waived. Under 5 U.S.C. § 552(a)(4)(A)(iii), fees may be waived where the requestor has demonstrated that (i) disclosure of the information is in the public interest in that 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 requestor.

AIC, a non-profit organization, educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, promotes the just and fair administration of our immigration laws, and protects the constitutional and legal rights of noncitizens. Through research, analysis and publications, AIC's Immigration Policy Center (IPC) provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. The Legal Action Center (LAC) provides technical assistance to immigration lawyers across the country and engages in impact litigation, including appearing as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues.

a. *Disclosure of the Information is in the Public Interest*

DHS considers four factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the subject of the request concerns the 'operations or activities of the government,'"
- (2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"

- (3) “Whether disclosure of the requested information will contribute to ‘public understanding’” as opposed to the individual understanding of the requestor or a narrow segment of interested persons; and
- (4) “Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

For a request to be considered in the public interest, all four criteria must be satisfied. *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

The requested documents clearly concern identifiable “operations or activities” of the government. AIC seeks records related to the enforcement operations and activities of CBP, a government agency, near and at the U.S.-Mexico border.

The request satisfies the second criterion because disclosure is likely to contribute to a better understanding of government operations or activities related to immigration enforcement and border security, including DHS and CBP’s use of voluntary return in lieu of removal proceedings to effect the departure of unlawfully present noncitizens from the United States. AIC is not aware of any documents providing information responsive to this FOIA request. Because this information is not already in the public domain, its release will significantly increase understanding of DHS and CBP’s enforcement practices.

Disclosure of the requested information also will contribute to “public understanding,” as opposed to understanding of a narrow segment of interested persons. Release of this information to AIC will significantly advance the general public’s understanding of CBP’s enforcement operations and activities. It is likely that a proper search in response to this request will reveal a large volume of responsive information. AIC has the capacity, legal expertise, and intention to review, analyze, and synthesize this information and make it accessible to a broad public audience. AIC plans to draft and disseminate a summary report of this information on our website, which contains immigration-related information and news and is accessible by any member of the public. AIC’s website receives more than 58,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will circulate a summary of the information in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC will share this information with our extensive contacts in the national print and news media.

The request satisfies the last criterion because disclosure of the requested information will contribute significantly to public understanding about CBP’s enforcement practices in general and the agency’s use of voluntary return in particular. This information will be particularly helpful to immigration attorneys who represent noncitizens who may be subject to stops, arrests, detention and/or questioning by CBP agents, the noncitizens themselves, nonprofit organizations interested in civil and/or human rights, and other members of the public who are concerned with immigration agency proceedings and policies.

b. *Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requestor.*

DHS considers two factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure," and
- (2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

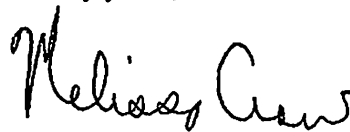
AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the general public and not for the purpose of commercial gain. Like all other reports and information available on the AIC website, information about CBP's enforcement practices received in response to this FOIA request will be available to immigration attorneys, noncitizens and other interested members of the public free of charge.

Given that FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). If you deny the fee waiver request, we respectfully ask for a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Please inform us if the charges for this FOIA production will exceed \$25.00.

Thank you in advance for your timely response to this request. If you have any questions, please feel free to contact me at (202) 507-7523 or by e-mail at [mcrow@immcouncil.org](mailto:mcrow@immcouncil.org).

Sincerely yours,



Melissa Crow  
Director, Legal Action Center  
American Immigration Council  
1331 G Street, NW, Suite 200  
Washington, DC 20005-3141  
Tel: (202) 507-7523  
Fax: (202) 742-5619  
E-mail: [mcrow@immcouncil.org](mailto:mcrow@immcouncil.org)

1300 Pennsylvania Avenue NW  
Washington, DC 20229



**U.S. Customs and  
Border Protection**  
DIS-2:OT:CTE:FD PH  
2011F13090

August 3, 2011

Melissa Crow  
Director, Legal Action Center  
American Immigration Council  
1331 G Street NW, Suite 200  
Washington, DC 20005

Dear Ms. Crow:

This is a partial response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested the following information:

1. How DHS and/or CBP agents decide to stop, arrest and/or detain individuals believed to be present in the United States in violation of the immigration laws.
2. Guidance, guidelines, directives, rules, policies, procedures or other documents that address questioning of individuals apprehended by DHS and/or CBP agents.
3. Criteria or other standards used by DHS and/or CBP agents to determine whether individuals they have apprehended are eligible for voluntary return.
4. Guidance, guidelines, directives, rules, policies, procedures or other documents that address means of determining that individuals apprehended by DHS and/or CBP agents knowingly and voluntarily consent to voluntary return and knowingly and voluntarily waive their right to a hearing before an immigration judge and/or to any immigration relief for which they may be eligible.
5. Guidance, guidelines, directives, rules, policies, procedures, instructions, memoranda or other documents regarding an agent's use or coercive tactics, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
6. Any other guidance, guidelines, directives, rules, policies, procedures or other documents that address processing of individuals apprehended by CBP for voluntary return in lieu of removal.
7. Guidance, guidelines, directives, rules, policies, procedures, or other documents that address means of ensuring that individuals who have signed Form I-826, Notice of Rights and Request for Disposition, depart from the United States.
8. Agreements, correspondence, or communications within and/or among CBP, DHS, any of their agents, agencies, sub-agencies, or offices, and/or U.S. Attorneys' Offices regarding the use of voluntary return in lieu of removal.
9. Training materials used to educate CBP agents about the use of voluntary return in lieu of removal.

**Exhibit C-1**

10. From January 2009 to April 2011, the total number of voluntary returns of individuals to their countries of origin, the nationalities of individuals who agreed to voluntary return, and, if available, the number of voluntary returns per month.
11. Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
12. Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
13. Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
14. Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.

Please note that we will be unable to respond to parts 11 through 14 of your request as currently constructed. The term "misconduct" as used by CBP applies to all incidents that are a violation of the rules and regulations of CBP; you will need to be more specific as to the type of misconduct you are interested in. Further, please note that reports are primarily retrieved via name, date of birth, SSN or other personal identifiers specific to the employee. We are unable to pull statistical information such as "allegations of coercive tactics by agents". Please also note that these reports are not sorted by title; we can not request "all Border Patrol Agent reports".

At this time, parts 11 through 14 of your request are considered unperfected. If you do have the names of individuals involved in these reports, you will need to provide written consent from those individuals for us to release records, per third party privacy laws.

CBP is including four pages of records responsive to your request in this response. CBP has determined that three pages of records are fully releasable and responsive to part 10 of your request. We have also included one additional page with limited redactions, pursuant to Title 5 U.S.C. § 552 (b)(6) and (b)(7)(C).

**Exemption (b)(6)** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. [*The types of documents and/or*

*information that we have withheld may consist of birth certificates, naturalization certificates, driver license, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.]* The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

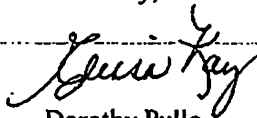
**Exemption (b)(7)(C)** protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate.

You have a right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 799 Ninth Street, NW, 5<sup>th</sup> Floor, Washington, DC 20229-1179, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call (877) 684-6448.

This office may be reached at (202) 325-0150. Please notate file number 2011F13090 on any future correspondence to CBP related to this request.

Sincerely,



Dorothy Pullo  
Director, FOIA Division  
Office of International Trade

Enclosure(s)

1300 Pennsylvania Avenue NW  
Washington, DC 20229

OBP 10.9-C



**U.S. Customs and  
Border Protection**

**JUN 17 2009**

**MEMORANDUM FOR:** All Chief Patrol Agents  
All Division Chiefs

**FROM:**  David V. Aguilar  
Chief  
U.S. Border Patrol

(b)(6),(b)(7)(C)

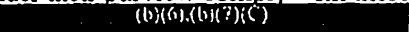
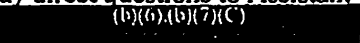
**SUBJECT:** Juvenile Processing Guidance

The U.S. Border Patrol takes great strides to ensure that all subjects are adequately cared for while in our custody and that all juveniles, including unaccompanied alien children, are treated with dignity, respect, and special concern for their particular vulnerabilities. The Border Patrol currently processes, detains, and cares for juveniles, including unaccompanied alien children, based upon guidelines and requirements set forth in the 1997 *Flores v. Reno* Settlement Agreement, the Homeland Security Act of 2002, the Border Patrol Hold Room and Short Term Detention Policy, the Trafficking Victim's Protection Reauthorization Act of 2008 Interim Guidance, and Customs and Border Protection Form 93 "Unaccompanied Alien Child Screening Addendum."

Agents must familiarize themselves with these policies and procedures. Adherence to these guidelines will safeguard the welfare of juveniles and ensure processing efficiency.

Timely and accurate recording of juvenile apprehension, processing, and detention are critical to mission success. Supervisors shall review and approve processing forms and juvenile disposition prior to transfer or removal. As indicated in the Border Patrol Handbook, Chapter 22, Preparation and Distribution of Forms and Reports, "Border Patrol Agents are responsible for the accuracy of any forms or reports they submit. Supervisors are accountable for any reports or forms they forward, regardless of whether their signature or initials are required."

Chief Patrol Agents will ensure that agents under their purview comply with these instructions.

Staff may direct questions to Assistant Chief  or Operations Officer 

(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)

# **U.S. Border Patrol Voluntary Returns**

**January 2009 - April 2011**

*Data includes Deportable Aliens Only*

Data Source: EID (unofficial) as of 7/14/11

|                            | FY2009 |        |        |        |        |        |        |        |        |
|----------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| CITIZENSHIP                | JAN    | FEB    | MAR    | APR    | MAY    | JUN    | JUL    | AUG    | SEP    |
| CANADA                     | 7      | 20     | 10     | 16     | 22     | 54     | 84     | 65     | 38     |
| CHINA, PEOPLES REPUBLIC OF |        |        |        |        | 1      |        |        |        |        |
| DOMINICAN REPUBLIC         | 10     |        | 3      | 2      | 1      | 3      | 2      | 3      | 1      |
| MEXICO                     | 31,458 | 34,072 | 50,025 | 42,744 | 34,743 | 30,911 | 28,381 | 27,562 | 22,312 |
| Grand Total                | 31,475 | 34,092 | 50,038 | 42,762 | 34,767 | 30,968 | 28,467 | 27,568 | 22,351 |

|                            | FY2010 |        |        |        |        |        |        |        |        |        |        |       |
|----------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|-------|
| CITIZENSHIP                | OCT    | NOV    | DEC    | JAN    | FEB    | MAR    | APR    | MAY    | JUNE   | JUL    | AUG    | SEP   |
| CANADA                     | 8      | 13     | 4      | 13     | 28     | 24     | 15     | 32     | 81     | 170    | 110    | 20    |
| CHINA, PEOPLES REPUBLIC OF |        |        |        | 1      | 2      |        |        |        |        |        |        |       |
| DOMINICAN REPUBLIC         | 1      | 9      |        |        |        | 11     | 2      | 3      |        | 2      | 13     | 16    |
| MEXICO                     | 26,205 | 19,315 | 13,682 | 20,730 | 27,838 | 41,314 | 35,826 | 28,588 | 18,579 | 14,126 | 11,621 | 9,756 |
| Grand Total                | 26,214 | 19,337 | 13,686 | 20,744 | 27,868 | 41,349 | 35,843 | 28,623 | 18,660 | 14,128 | 11,634 | 9,776 |

| CITIZENSHIP                | FY2011 |       |       |        |        |        |        | JAN 09 - APR 11 |
|----------------------------|--------|-------|-------|--------|--------|--------|--------|-----------------|
|                            | OCT    | NOV   | DEC   | JAN    | FEB    | MAR    | APR    |                 |
| CANADA                     | 12     | 13    | 2     | 7      | 3      | 15     | 5      |                 |
| CHINA, PEOPLES REPUBLIC OF |        | 2     |       |        |        | 1      |        |                 |
| DOMINICAN REPUBLIC         | 13     | 12    | 8     | 12     | 3      | 16     | 8      |                 |
| MEXICO                     | 10,892 | 8,720 | 7,898 | 11,540 | 13,469 | 22,654 | 17,526 |                 |
| Grand Total                | 10,917 | 8,735 | 7,908 | 11,559 | 13,475 | 22,685 | 17,539 |                 |

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Matthew J. Piers  
Direct Line: 312.604.2606  
Direct Fax: 312.604.2607  
E-mail: [mpiers@hsplegal.com](mailto:mpiers@hsplegal.com)

September 26, 2011

**VIA OVERNIGHT MAIL**

FOIA Appeals  
U.S. Customs and Border Protection  
799 Ninth Street, NW, Mint Annex  
Washington, DC 20229-1179

Re: Freedom of Information Act Request Reference Number  
2011F13090, Freedom of Information Act Appeal

Dear Sir or Madam:

We represent the American Immigration Council (AIC) with regard to the above-referenced matter. On June 15, 2011, AIC submitted a FOIA request to U.S. Customs and Border Patrol (CBP), requesting records that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present (the "AIC Request," attached as Exhibit A). On August 3, 2011, CBP responded to AIC's FOIA request in a letter signed by Dorothy Pullo, Director, FOIA Division, Office of International Trade (the "CBP Response," attached as Exhibit B). This letter is an appeal of CBP's adverse determination, pursuant to FOIA, 5 U.S.C. § 552 and 6 C.F.R. § 5.9. This appeal is filed within 60 days of CBP's August 3, 2011 letter, pursuant to 6 C.F.R. § 5.9.

AIC's Request identified fourteen, non-exhaustive categories of records that would be responsive to its request. See Exhibit A at 1-3.

Specifically, AIC indicated that responsive records would include but not be limited to, records describing, referring, or relating to:

- (1) How DHS and/or CBP agents decide to stop, arrest and/or detain individuals believed to be present in the United States in violation of the immigration laws.
- (2) Guidance, guidelines, directives, rules, policies, procedures or other documents that address questioning of individuals apprehended by DHS and/or CBP agents.

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FOIA Appeals, Policy and Litigation Branch  
U.S. Customs and Border Protection  
September 26, 2011  
Page 2

- (3) Criteria or other standards used by DHS and/or CBP agents to determine whether individuals they have apprehended are eligible for voluntary return;
- (4) Guidance, guidelines, directives, rules, policies, procedures or other documents that address means of determining that individuals apprehended by DHS and/or CBP agents knowingly and voluntarily consent to voluntary return and knowingly and voluntarily waive their right to a hearing before an immigration judge and/or to any immigration relief for which they may be eligible.
- (5) Guidance, guidelines, directives, rules, policies, procedures, instructions, memoranda or other documents regarding an agent's use of coercive tactics, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (6) Any other guidance, guidelines, directives, rules, policies, procedures or other documents that address processing of individuals apprehended by CBP for voluntary return in lieu of removal.
- (7) Guidance, guidelines, directives, rules, policies, procedures, or other documents that address means of ensuring that individuals who have signed Form I-826, Notice of Rights and Request for Disposition, depart from the United States.
- (8) Agreements, correspondence, or communications within and/or among CBP, DHS, any of their agents, agencies, sub-agencies, or offices, and/or U.S. Attorneys' Offices regarding the use of voluntary return in lieu of removal.
- (9) Training materials used to educate CBP agents about the use of voluntary return in lieu of removal.
- (10) From January 2009 to April 2011, the total number of voluntary returns of individuals to their countries of origin, the nationalities of individuals who agreed to voluntary return, and, if available, the number of voluntary returns per month.
- (11) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not

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FOIA Appeals, Policy and Litigation Branch  
U.S. Customs and Border Protection  
September 26, 2011  
Page 3

limited to documents relating to the alleged mistreatment of any individual while in CBP custody.

- (12) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (13) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
- (14) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.

In its response, CBP provided four pages of records relevant to parts 1 through 10 of AIC's Request. CBP also indicated that it was "unable to respond to parts 11 through 14" of AIC's Request because: (1) the "term 'misconduct' as used by CBP applies to all incidents that are a violation of the rules and regulations of CBP" and AIC was not sufficiently specific as to the "type of misconduct [it was] interested in"; (2) reports are "primarily retrieved via name, date of birth, SSN or other personal identifiers specific to the employee," and responsive records could not be retrieved unless AIC provided specific names of individuals involved in responsive reports; and (3) written consent is required from those individuals "involved in [responsive] reports...per third party privacy laws." Exhibit B at 2.

CBP has failed to provide to AIC a vast number of records that are relevant to AIC's Request and releasable under FOIA. AIC now appeals CBP's unfounded adverse determination.

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U.S. Customs and Border Protection  
September 26, 2011  
Page 4

I. CBP DID NOT CONDUCT AN ADEQUATE SEARCH.

CBP did not conduct an adequate search for records responsive to AIC's comprehensive request for information regarding CBP's enforcement operations and activities related to voluntary returns.

An agency must carry out a reasonable search for records responsive to a FOIA request. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). It must show that its search was reasonably calculated to uncover relevant documents. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994); *see also Concepcion v. U.S. Customs and Border Protection*, 767 F.Supp.2d 141, 145 (D.D.C. 2011) ("An agency must search for documents in good faith, using methods that are reasonably expected to produce the requested information.").

CBP has produced only four pages of records in response to AIC's Request – a policy memorandum dated June 17, 2009 providing "Juvenile Processing Guidance," and a chart listing the number of voluntary returns, by country, conducted by CBP from January 2009 to April 2011. This limited production makes clear that CBP did not conduct a search reasonably calculated to uncover relevant documents.

The Department of Homeland Security reports that 476,405 voluntary returns occurred in 2010, and that most were comprised of Mexican nationals who were apprehended by CBP and returned to Mexico. *See Office of Immigration Statistics, U.S. Dept. of Homeland Security, 2010 Yearbook of Immigration Statistics* 94 (August 2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf). The chart produced with CBP's Response appears to indicate that CBP coordinated 662,485 voluntary returns of Mexican nationals between January 2009 and April 2011. *See Exhibit B, U.S. Border Patrol Voluntary Returns: January 2009-April 2011* at 3. Given the large number of voluntary returns that CBP manages each year and the significant resources that enforcement operations and activities related to the process must require, it is simply impossible that CBP undertook a reasonable search and determined that only two documents, comprising four pages of records, were responsive to AIC's Request.

Moreover, AIC's request for "records" related to voluntary returns encompasses all records or communications preserved in electronic or written form, including but not limited to: correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, training manuals, technical specifications, training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes.

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FOIA Appeals, Policy and Litigation Branch  
U.S. Customs and Border Protection  
September 26, 2011  
Page 5

CBP's response is conspicuously missing a variety of these documents including guidance, guidelines, directives, rules, policies, procedures, training materials, and correspondence related to the fourteen categories of records explicitly identified in the AIC Request. In addition, publicly available agency documents regarding CBP's operations and activities related to stipulated removals show that CBP has failed to provide specific types of agency documents which it has produced in the past, such as Delegation Orders, training presentation documents, deportation guidelines, and individual case records including completed Record of Deportable/Inadmissible Alien forms, Records of Action, Enforcement Responses, and legal documents. *See Stanford Legal Clinic, Deportation Without Due Process: Documents Obtained Through Freedom of Information Act Lawsuit About Federal Government's Stipulated Removal Program* (Sept. 1, 2010), available at <http://blogs.law.stanford.edu/stipulatedremoval> (providing 124 pages of documents produced by CBP related to stipulated removals).

This makes clear CBP could not have undertaken a reasonable search. *See Concepcion v. U.S. Customs and Border Protection*, 767 F.Supp.2d 141, 146 (D.D.C. 2011) ("to demonstrate the adequacy of its search, CBP must show that it searched *all* files likely to contain records responsive to the plaintiff's request" (emphasis added)).

**II. CBP ERRED FACTUALLY AND LEGALLY IN DETERMINING THAT PARTS 11-14 OF THE REQUEST WERE "UNPERFECTED."**

CBP's failure to undertake a reasonable search of its records is underscored by its discussion of, and rationale for, failing to release relevant CBP incident reports related to parts 11 through 14 of the AIC Request, which it claims are "unperfected." CBP maintains that it cannot produce incident reports to AIC because such records are "primarily retrieved" by employee personal identifiers and AIC has not provided CBP with sufficient information to search for relevant records (such as the names of CBP employees involved in potentially relevant incidents). Exhibit B at 2. CBP also contends that AIC has inadequately described the type of incident reports it seeks and must more specifically define "the type of misconduct [AIC is] interested in." *Id.* To the contrary, AIC has reasonably described the records it seeks, and thus CBP is obligated to produce them. *See* 5 U.S.C. § 552(a)(3)(A) (records must be made available "upon any request" which "reasonably describes such records").

Despite CBP's contention, AIC has provided information sufficient for CBP to uncover incident reports relevant to AIC's requests. The term "misconduct" (which only appears in parts 11 and 13 of the AIC Request), is not overly broad given that AIC has limited its request to "CBP enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present." *See* Exhibit A at 1. Furthermore, AIC's Request makes clear that it seeks, at the very least, records, including but not limited to reports related to the "alleged mistreatment" of individuals

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FOIA Appeals, Policy and Litigation Branch  
U.S. Customs and Border Protection  
September 26, 2011  
Page 6

in CBP custody, and “the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.” See Exhibit A at 2-3.

While CBP may “primarily retrieve[]” its reports by employee personal identifiers, it has an obligation under FOIA to conduct a reasonable search of its records. A mere recitation of common search parameters does not constitute a reasonable search. See *W. Ctr. For Journalism v. Internal Revenue Serv.*, 116 F.Supp.2d 1, 8 (D.D.C. 2000) (an agency’s search need not be exhaustive but it must be reasonable); 5 U.S.C. § 552(a)(3)(D) (“the term ‘search’ means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request”). Further, as Department of Homeland Security statistics show that in 2009 and 2010 a total of only 113 complaints were filed against CBP, the universe of relevant records which CBP must review and potentially produce is not unduly burdensome. See U.S. Department of Homeland Security, *Data on Complaints Received* (January 28, 2011), available at [http://www.dhs.gov/xabout/structure/gc\\_1280851127243.shtm](http://www.dhs.gov/xabout/structure/gc_1280851127243.shtm) (listing the number of complaints filed against CBP each year from 2003 to 2010 on issues including “abuse of authority,” “discrimination,” “profiling,” and “treatment”).

AIC has provided sufficient information for CBP to search its incident reports, either manually or via search terms, and FOIA requires it to do so.

**III. CBP MUST PRODUCE ALL RESPONSIVE, NON-EXEMPT INFORMATION IN ITS POSSESSION THAT IS NOT ALREADY IN THE PUBLIC DOMAIN.**

CBP has an obligation to provide all relevant, non-exempt material that a reasonable search uncovers. See 5 U.S.C. § 552(a)(3). As discussed above, a reasonable search of CBP’s records incontrovertibly would reveal more information than CBP has produced. If CBP has declined to provide responsive records because it believes that such records meet the criteria for exemptions set forth in 5 U.S.C. § 552(b), AIC requests that CBP provide it with a complete list of responsive documents along with a specific indication of any material withheld and the exemption(s) that CBP claims is applicable so that AIC may respond to such contentions with specificity.

In addition, CBP’s assertion that AIC must provide written consent from any individuals “involved in” CBP reports before CBP can release records, “per third party privacy laws,” see Exhibit B at 2, is in error. FOIA requires CBP to produce the relevant portions of records with any exempt material redacted. 5 U.S.C. § 552(b) (“[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt”); *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007) (“An agency cannot justify withholding an entire document simply by showing that it contains some exempt

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FOIA Appeals, Policy and Litigation Branch  
U.S. Customs and Border Protection  
September 26, 2011  
Page 7

material”) (citations omitted). This principle encompasses the type of private information that CBP has stated may be present in incident reports. *See* 5 U.S.C. § 552(b) (exemptions related to private information encompassed by segregation requirement); *see also* Exhibit B (discussing the Juvenile Processing Guidance that was produced in the CBP Response with private information redacted pursuant to exemptions set forth at 5 U.S.C. § 552(b)(6) and (b)(7)(C)).

Please provide a response to this appeal within twenty (20) business days stipulated by 5 U.S.C. § 552(a)(6)(A)(ii).

Thank you for your attention to this matter. Please contact me at (312) 604-2606, or by email at [mpiers@hsplegal.com](mailto:mpiers@hsplegal.com), if you have any questions or would like any clarification of the requests above.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Piers", written in a cursive style.

Matthew J. Piers

/mjp

## **EXHIBIT A**



COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

June 15, 2011

VIA ELECTRONIC MAIL

U.S. Customs and Border Protection  
FOIA Division  
799 9th Street, NW, Mint Annex  
Washington, DC 20229-1181  
[CBPFOIA@dhs.gov](mailto:CBPFOIA@dhs.gov)

Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officer:

The American Immigration Council (AIC) submits this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*

Request for Information

AIC requests disclosure of any and all records<sup>1</sup> that were prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection (CBP)<sup>2</sup> that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present. For purposes of this request, the term "voluntary returns" shall encompass grants of voluntary departure prior to the initiation of removal proceedings pursuant to 8 U.S.C. § 1229c(a).

The requested records include, but are not limited to, those describing, referring or relating to:

- (1) How DHS and/or CBP agents decide to stop, arrest and/or detain individuals believed to be present in the United States in violation of the immigration laws.
- (2) Guidance, guidelines, directives, rules, policies, procedures or other documents that address questioning of individuals apprehended by DHS and/or CBP agents.

<sup>1</sup> The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, training manuals, technical specifications, training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

<sup>2</sup> The term "CBP" as used herein means CBP headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structures.

[www.americanimmigrationcouncil.org](http://www.americanimmigrationcouncil.org)

- (3) Criteria or other standards used by DHS and/or CBP agents to determine whether individuals they have apprehended are eligible for voluntary return;
- (4) Guidance, guidelines, directives, rules, policies, procedures or other documents that address means of determining that individuals apprehended by DHS and/or CBP agents knowingly and voluntarily consent to voluntary return and knowingly and voluntarily waive their right to a hearing before an immigration judge and/or to any immigration relief for which they may be eligible.
- (5) Guidance, guidelines, directives, rules, policies, procedures, instructions, memoranda or other documents regarding an agent's use of coercive tactics, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (6) Any other guidance, guidelines, directives, rules, policies, procedures or other documents that address processing of individuals apprehended by CBP for voluntary return in lieu of removal.
- (7) Guidance, guidelines, directives, rules, policies, procedures, or other documents that address means of ensuring that individuals who have signed Form I-826, Notice of Rights and Request for Disposition, depart from the United States.
- (8) Agreements, correspondence, or communications within and/or among CBP, DHS, any of their agents, agencies, sub-agencies, or offices, and/or U.S. Attorneys' Offices regarding the use of voluntary return in lieu of removal.
- (9) Training materials used to educate CBP agents about the use of voluntary return in lieu of removal.
- (10) From January 2009 to April 2011, the total number of voluntary returns of individuals to their countries of origin, the nationalities of individuals who agreed to voluntary return, and, if available, the number of voluntary returns per month.
- (11) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
- (12) Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
- (13) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged misconduct by DHS or CBP agents within 100 miles of the

U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.

- (14) Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.

We request that records existing in electronic format be provided in electronic format or on a compact disc. If any of the requested records or information is not in a succinct format, we request the opportunity to view the documents in your offices.

If any of the information requested is considered exempt under applicable law, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the information is withheld and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

Request for fee waiver

AIC requests that all fees associated with this FOIA request be waived. Under 5 U.S.C. § 552(a)(4)(A)(iii), fees may be waived where the requestor has demonstrated that (i) disclosure of the information is in the public interest in that 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 requestor.

AIC, a non-profit organization, educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, promotes the just and fair administration of our immigration laws, and protects the constitutional and legal rights of noncitizens. Through research, analysis and publications, AIC's Immigration Policy Center (IPC) provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. The Legal Action Center (LAC) provides technical assistance to immigration lawyers across the country and engages in impact litigation, including appearing as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues.

*a. Disclosure of the Information is in the Public Interest*

DHS considers four factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the subject of the request concerns the 'operations or activities of the government,'"
- (2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"

- (3) “Whether disclosure of the requested information will contribute to ‘public understanding’” as opposed to the individual understanding of the requestor or a narrow segment of interested persons; and
- (4) “Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

For a request to be considered in the public interest, all four criteria must be satisfied. *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

The requested documents clearly concern identifiable “operations or activities” of the government. AIC seeks records related to the enforcement operations and activities of CBP, a government agency, near and at the U.S.-Mexico border.

The request satisfies the second criterion because disclosure is likely to contribute to a better understanding of government operations or activities related to immigration enforcement and border security, including DHS and CBP’s use of voluntary return in lieu of removal proceedings to effect the departure of unlawfully present noncitizens from the United States. AIC is not aware of any documents providing information responsive to this FOIA request. Because this information is not already in the public domain, its release will significantly increase understanding of DHS and CBP’s enforcement practices.

Disclosure of the requested information also will contribute to “public understanding,” as opposed to understanding of a narrow segment of interested persons. Release of this information to AIC will significantly advance the general public’s understanding of CBP’s enforcement operations and activities. It is likely that a proper search in response to this request will reveal a large volume of responsive information. AIC has the capacity, legal expertise, and intention to review, analyze, and synthesize this information and make it accessible to a broad public audience. AIC plans to draft and disseminate a summary report of this information on our website, which contains immigration-related information and news and is accessible by any member of the public. AIC’s website receives more than 58,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will circulate a summary of the information in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC will share this information with our extensive contacts in the national print and news media.

The request satisfies the last criterion because disclosure of the requested information will contribute significantly to public understanding about CBP’s enforcement practices in general and the agency’s use of voluntary return in particular. This information will be particularly helpful to immigration attorneys who represent noncitizens who may be subject to stops, arrests, detention and/or questioning by CBP agents, the noncitizens themselves, nonprofit organizations interested in civil and/or human rights, and other members of the public who are concerned with immigration agency proceedings and policies.

b. *Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requestor.*

DHS considers two factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure," and
- (2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

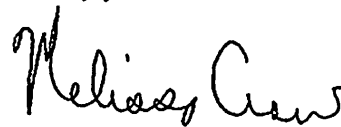
AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the general public and not for the purpose of commercial gain. Like all other reports and information available on the AIC website, information about CBP's enforcement practices received in response to this FOIA request will be available to immigration attorneys, noncitizens and other interested members of the public free of charge.

Given that FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). If you deny the fee waiver request, we respectfully ask for a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Please inform us if the charges for this FOIA production will exceed \$25.00.

Thank you in advance for your timely response to this request. If you have any questions, please feel free to contact me at (202) 507-7523 or by e-mail at [mcrow@immcouncil.org](mailto:mcrow@immcouncil.org).

Sincerely yours,



Melissa Crow  
Director, Legal Action Center  
American Immigration Council  
1331 G Street, NW, Suite 200  
Washington, DC 20005-3141  
Tel: (202) 507-7523  
Fax: (202) 742-5619  
E-mail: [mcrow@immcouncil.org](mailto:mcrow@immcouncil.org)

## **EXHIBIT B**

1300 Pennsylvania Avenue NW  
Washington, DC 20229



**U.S. Customs and  
Border Protection**  
DIS-2:OT:CTE:FD PH  
2011F13090

August 3, 2011

Melissa Crow  
Director, Legal Action Center  
American Immigration Council  
1331 G Street NW, Suite 200  
Washington, DC 20005

Dear Ms. Crow:

This is a partial response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested the following information:

1. How DHS and/or CBP agents decide to stop, arrest and/or detain individuals believed to be present in the United States in violation of the immigration laws.
2. Guidance, guidelines, directives, rules, policies, procedures or other documents that address questioning of individuals apprehended by DHS and/or CBP agents.
3. Criteria or other standards used by DHS and/or CBP agents to determine whether individuals they have apprehended are eligible for voluntary return.
4. Guidance, guidelines, directives, rules, policies, procedures or other documents that address means of determining that individuals apprehended by DHS and/or CBP agents knowingly and voluntarily consent to voluntary return and knowingly and voluntarily waive their right to a hearing before an immigration judge and/or to any immigration relief for which they may be eligible.
5. Guidance, guidelines, directives, rules, policies, procedures, instructions, memoranda or other documents regarding an agent's use or coercive tactics, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
6. Any other guidance, guidelines, directives, rules, policies, procedures or other documents that address processing of individuals apprehended by CBP for voluntary return in lieu of removal.
7. Guidance, guidelines, directives, rules, policies, procedures, or other documents that address means of ensuring that individuals who have signed Form I-826, Notice of Rights and Request for Disposition, depart from the United States.
8. Agreements, correspondence, or communications within and/or among CBP, DHS, any of their agents, agencies, sub-agencies, or offices, and/or U.S. Attorneys' Offices regarding the use of voluntary return in lieu of removal.
9. Training materials used to educate CBP agents about the use of voluntary return in lieu of removal.

10. From January 2009 to April 2011, the total number of voluntary returns of individuals to their countries of origin, the nationalities of individuals who agreed to voluntary return, and, if available, the number of voluntary returns per month.
11. Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
12. Complaints, correspondence, communications, or other documents from any individual or entity regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.
13. Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged misconduct by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to documents relating to the alleged mistreatment of any individual while in CBP custody.
14. Memoranda, reports, correspondence, communications, or other documents regarding investigations undertaken by DHS, CBP, or another government agency regarding alleged use of coercive tactics by DHS or CBP agents within 100 miles of the U.S.-Mexico border, including but not limited to the actual or threatened use of violence, sexual assault, and/or retaliation against family members to persuade individuals apprehended by DHS and/or CBP to accept voluntary return.

Please note that we will be unable to respond to parts 11 through 14 of your request as currently constructed. The term "misconduct" as used by CBP applies to all incidents that are a violation of the rules and regulations of CBP; you will need to be more specific as to the type of misconduct you are interested in. Further, please note that reports are primarily retrieved via name, date of birth, SSN or other personal identifiers specific to the employee. We are unable to pull statistical information such as "allegations of coercive tactics by agents". Please also note that these reports are not sorted by title; we can not request "all Border Patrol Agent reports".

At this time, parts 11 through 14 of your request are considered unperfected. If you do have the names of individuals involved in these reports, you will need to provide written consent from those individuals for us to release records, per third party privacy laws.

CBP is including four pages of records responsive to your request in this response. CBP has determined that three pages of records are fully releasable and responsive to part 10 of your request. We have also included one additional page with limited redactions, pursuant to Title 5 U.S.C. § 552 (b)(6) and (b)(7)(C).

Exemption (b)(6) exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. [*The types of documents and/or*

*information that we have withheld may consist of birth certificates, naturalization certificates, driver license, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.] The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.*

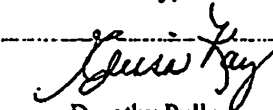
Exemption (b)(7)(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate.

You have a right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 799 Ninth Street, NW, 5<sup>th</sup> Floor, Washington, DC 20229-1179, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call (877) 684-6448.

This office may be reached at (202) 325-0150. Please notate file number 2011F13090 on any future correspondence to CBP related to this request.

Sincerely,



Dorothy Pullo  
Director, FOIA Division  
Office of International Trade

Enclosure(s)

1300 Pennsylvania Avenue NW  
Washington, DC 20229

OBP 10.9-C



**U.S. Customs and  
Border Protection**

**JUN 17 2009**

**MEMORANDUM FOR:** All Chief Patrol Agents  
All Division Chiefs

**FROM:** *G* David V. Aguilar  
Chief  
U.S. Border Patrol

(b)(6),(b)(7)(C)

**SUBJECT:** Juvenile Processing Guidance

The U.S. Border Patrol takes great strides to ensure that all subjects are adequately cared for while in our custody and that all juveniles, including unaccompanied alien children, are treated with dignity, respect, and special concern for their particular vulnerabilities. The Border Patrol currently processes, detains, and cares for juveniles, including unaccompanied alien children, based upon guidelines and requirements set forth in the 1997 *Flores v. Reno* Settlement Agreement, the Homeland Security Act of 2002, the Border Patrol Hold Room and Short Term Detention Policy, the Trafficking Victim's Protection Reauthorization Act of 2008 Interim Guidance, and Customs and Border Protection Form 93 "Unaccompanied Alien Child Screening Addendum."

Agents must familiarize themselves with these policies and procedures. Adherence to these guidelines will safeguard the welfare of juveniles and ensure processing efficiency.

Timely and accurate recording of juvenile apprehension, processing, and detention are critical to mission success. Supervisors shall review and approve processing forms and juvenile disposition prior to transfer or removal. As indicated in the Border Patrol Handbook, Chapter 22, Preparation and Distribution of Forms and Reports, "Border Patrol Agents are responsible for the accuracy of any forms or reports they submit. Supervisors are accountable for any reports or forms they forward, regardless of whether their signature or initials are required."

Chief Patrol Agents will ensure that agents under their purview comply with these instructions.

Staff may direct questions to Assistant Chief *(b)(6),(b)(7)(C)* or Operations Officer *(b)(6),(b)(7)(C)*

**U.S. Border Patrol Voluntary Returns****January 2009 - April 2011***Data Includes Deportable Aliens Only*

Data Source: EID (unofficial) as of 7/14/11

|                            | FY2009        |               |               |               |               |               |               |               |               |
|----------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| CITIZENSHIP                | JAN           | FEB           | MAR           | APR           | MAY           | JUN           | JUL           | AUG           | SEP           |
| CANADA                     | 7             | 20            | 10            | 16            | 22            | 54            | 84            | 65            | 38            |
| CHINA, PEOPLES REPUBLIC OF |               |               |               |               | 1             |               |               |               |               |
| DOMINICAN REPUBLIC         | 10            |               | 3             | 2             | 1             | 3             | 2             | 3             | 1             |
| MEXICO                     | 31,458        | 34,072        | 50,025        | 42,744        | 34,743        | 30,911        | 28,381        | 27,582        | 22,312        |
| <b>TOTAL</b>               | <b>31,475</b> | <b>34,092</b> | <b>50,035</b> | <b>42,760</b> | <b>34,764</b> | <b>30,968</b> | <b>28,463</b> | <b>27,650</b> | <b>22,351</b> |

|                            | FY2010        |               |               |               |               |               |               |               |               |               |               |              |
|----------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|--------------|
| CITIZENSHIP                | OCT           | NOV           | DEC           | JAN           | FEB           | MAR           | APR           | MAY           | JUN           | JUL           | AUG           | SEP          |
| CANADA                     | 8             | 13            | 4             | 13            | 28            | 24            | 15            | 32            | 81            | 170           | 110           | 20           |
| CHINA, PEOPLES REPUBLIC OF |               |               |               | 1             | 2             |               |               |               |               |               |               |              |
| DOMINICAN REPUBLIC         | 1             | 9             |               |               |               | 11            | 2             | 3             |               | 2             | 13            | 16           |
| MEXICO                     | 26,205        | 19,315        | 13,682        | 20,730        | 27,838        | 41,314        | 35,826        | 28,588        | 18,579        | 14,126        | 11,621        | 9,756        |
| <b>TOTAL</b>               | <b>26,213</b> | <b>19,324</b> | <b>13,686</b> | <b>20,741</b> | <b>27,866</b> | <b>41,325</b> | <b>35,841</b> | <b>28,621</b> | <b>18,581</b> | <b>14,128</b> | <b>11,634</b> | <b>9,772</b> |

|                            | FY2011 |       |       |        |        |        |        |                 |
|----------------------------|--------|-------|-------|--------|--------|--------|--------|-----------------|
| CITIZENSHIP                | OCT    | NOV   | DEC   | JAN    | FEB    | MAR    | APR    | JAN 09 - APR 11 |
| CANADA                     | 12     | 13    | 2     | 7      | 3      | 15     | 6      |                 |
| CHINA, PEOPLES REPUBLIC OF |        | 2     |       |        |        | 1      |        |                 |
| DOMINICAN REPUBLIC         | 13     | 12    | 8     | 12     | 3      | 16     | 8      |                 |
| MEXICO                     | 10,892 | 8,720 | 7,898 | 11,540 | 13,469 | 22,654 | 17,528 |                 |
| GUANTANAMO                 | 10,977 | 8,731 | 7,908 | 11,553 | 13,473 | 22,658 | 17,532 |                 |

1300 Pennsylvania Avenue NW  
Washington, DC 20229

received  
10/17/11



**U.S. Customs and  
Border Protection**

OT:RR:FAPL

H188515

October 13, 2011

Mr. Matthew J. Piers  
Hughes Socol Piers Resnick Dym  
70 West Madison Street, Suite 4000  
Chicago, IL 60602

Dear Mr. Piers:

This acknowledges receipt of your correspondence dated September 26, 2011, on behalf of the American Immigration Council and your FOIA appeal.

The matter has been assigned to the FOIA Appeals, Policy & Litigation Branch for review and preparation of a response. Although we make every effort to promptly respond, other agency input may delay our response.

Your inquiry has been assigned to Andrew Langreich. If it becomes necessary to contact us regarding this matter, you may call him/her on (202) 325-0089 or write to us at U.S. Customs and Border Protection, OT/Regulations & Rulings, FOIA Appeals, Policy & Litigation Branch, 799 9<sup>th</sup> Street, NW – 5<sup>th</sup> Floor, Washington, DC 20229-1179. In any future correspondence, please refer to the file number in the upper right corner of this letter.

Any questions regarding substantive legal issues involved in your inquiry may be raised with the person to whom it is assigned. All questions regarding the priority or status of the processing should be raised with the undersigned.

Sincerely,

*Shari Suzuki*

Shari Suzuki, Chief  
FOIA Appeals, Policy & Litigation Branch

**Weekly Muster**

**Week of Muster:** November 19, 2007

**Topic:** Delegation of Authority for Enforcement Actions

**Reference Materials:** ICE Detention and Removal Manual Section 14.8,  
Inspector's Field Manual Section 17.11, 8 CFR § 241.8

**Headquarters POC:** (b) (5), (b) (7)(C)

**Office:** Admissibility and Passenger Programs

Authority to issue the following forms concerning any removable alien is hereby delegated to second-line supervisory CBP Officers:

- Notice to Appear, Form I-862;
- Warrant of Arrest, Form I-200;
- Order of Release on Recognizance, Form I-220A; and
- Decision to Reinstate Prior Order, Form I-871.

When an alien has demonstrated his or her intent to depart the United States, it serves no purpose to issue an NTA, because the alien is already executing the ultimate objective, which is removal from the United States. In such cases concerning non-arriving aliens, voluntary return should be considered as an exercise of discretion analogous to withdrawal of application for admission.

Where feasible, Voluntary Return cases should be documented in the ENFORCE VR module, consistent with existing procedures in the ICE Detention and Removal Manual Section 14.8. In circumstances where CBP Officers encounter outbound illegal aliens and there is insufficient time before the departure flight to collect biometrics, the officers may use the biographic data alone to create a record and lookout.

On February 6, 2007, the United States Court of Appeals for the Ninth Circuit reversed their previous decision in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484. This decision affirmed the authority of immigration officers to issue Form I-871, Decision to Reinstate Prior Order.

Questions on the policy outlined here may be directed to (b) (5), (b) (7)(C) Program Manager, Admissibility and Passenger Programs, at (202) (b) (5), (b) (7)(C)

**Prepared By:** (b) (5), (b) (7)(C)

**Date of Submission:** November 7, 2007

U.S. Department of Homeland Security  
Washington, DC 20229



U.S. Customs and  
Border Protection

(b)(2)

MAY 08 2006

MEMORANDUM FOR: ALL SECTOR CHIEF PATROL AGENTS

FROM:

for David V. Aguilar  
Chief  
U.S. Border Patrol

(b)(6) & (b)(7)(C)

SUBJECT: Retention of I-826, Notice of Rights and Request for  
Disposition

In the past, the Seventh, Eighth and Ninth Judicial Circuits have issued adverse decisions in the cancellation of removal cases, finding that there was insufficient evidence that an alien had been granted and accepted voluntary departure under threat of deportation. A key piece of evidence that would be of use in future litigation is the I-826, Notice of Rights and Request for Disposition, because the I-826 definitely demonstrates that the alien accepted voluntary departure.

An analysis of current U.S. Customs and Border Protection, Office of Border Patrol (OBP), procedures for the retention and ultimate destruction of the I-826 indicates a significant disparity in the long-term retention of I-826's by OBP.

OBP has reviewed the agency's policy and procedures with the Office of Chief Counsel and determined that it is prudent and in the best interest of the agency to temporarily cease the destruction of all signed I-826's.

Therefore, all Sector Chiefs are to ensure that I-826's with original signatures are to be retained until otherwise instructed or for a period of at least 10 years from their dates of signature.

OBP is cognizant of the increase in the necessary storage for signed I-826's and is exploring numerous options, such as the electronic storage of the I-826, for capturing electronic signatures. OBP will advise Sector Chiefs as soon as an alternative solution is identified.

Staff may direct questions to Associate Chief (b)(6) & (b)(7)(C) at (b)(2)