



March 13, 2021

Via Electronic Mail

FOIA Officer
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

Re: FOIA Request Regarding the Title 42 process

Dear FOIA Officer:

This letter constitutes a request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, concerning implementation of Title 42 of the Public Health Service Act beginning in March 2020 to the present. The request is submitted on behalf of the American Civil Liberties Union of Massachusetts (“ACLUM”).

I. Documents Requested

ACLUM requests the following records from U.S. Customs and Border Protection (“CBP”):

1. All communications and correspondence between CBP and Stephen Miller, the former senior policy advisor to former President Donald Trump; CBP and former Vice President Mike Pence; and CBP and the Centers for Disease Control and Prevention concerning the following:
 - a) The Public Health Service Act, 42 U.S. Code Part G, 42 U.S.C. §§ 264-72, including 42 U.S.C. §265;
 - b) Control of Communicable Diseases Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public

Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) (interim final rule);

- c) Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56,424 (Sept. 11, 2020) (final rule);
- d) Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020);
- e) Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 22,424 (Apr. 22, 2020);
- f) Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 31,503 (May 26, 2020);
- g) Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806 (Oct. 16, 2020); and
- h) CBP and U.S. Border Patrol, "Operation Capiro" Memo.

2. Any record regarding the implementation of the above (a-h) with respect to individuals seeking asylum, protection from torture, and other forms of humanitarian relief.

Unless otherwise specified, this request includes emails and other electronic documents. It also includes documents created up until the time that the search is concluded. Please provide documents in electronic format where possible.

II. Fee Waiver

ACLUM is entitled to a fee waiver under the FOIA statute and Department of Justice Regulations for two reasons. First, ACLUM qualifies as a representative of the news media. Second, release of the records requested is in the public interest and not in any commercial interest of the requester.

1. ACLUM is a representative of the news media as defined in the statute and regulations.

ACLUM is entitled to a fee waiver because it is a representative of the news media under both the FOIA statute and the Department of Justice regulations regarding FOIA fees. 5 U.S.C §551(a)(4)(A)(ii); 28 CFR 16.11(d)(1). ACLUM is a representative of the news media because it is an organization “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public,” where “news” is defined as “information that is about current events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 CFR § 16.11(b)(6).

ACLUM meets the statutory definition of a “representative of the news media” because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *Nat’s Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir 1989). *See also Electronic Privacy Information Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA.)

ACLUM is a non-profit, non-partisan civil rights and civil liberties organization with over 80,000 members and supporters across Massachusetts. ACLUM is the Massachusetts affiliate of the national ACLU, a non-profit, non-partisan organization with over 1.5 million members nationwide.

Gathering and disseminating current information to the public is a critical and substantial component of ACLUM’s mission and work. As described above, ACLUM regularly publishes reports that rely on data and information obtained from public records requests.¹ In fact, ACLUM has a dedicated Data

¹ See aclum.org/reports; see also ACLU of Massachusetts Briefing Paper, *Facts Over Fear: The benefits of declining to prosecute misdemeanor and low level offenses* (March 2019), aclum.org/sites/default/files/20180319_dtp-final.pdf; Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, THE CENTURY FOUNDATION (Mar. 2018), tcf.org/content/report/beyond-sanctuary/; Nasser Eledroos and Kade Crockford, *Social Media Monitoring in Boston: Free Speech in the Crosshairs* (Feb. 2018), privacysos.org/social-media-monitoring-boston-free-speech-crosshairs/; *No Tape, No Testimony: How Courts Can Ensure the Responsible Use of Body Cameras* (Nov. 2016), aclum.org/sites/default/files/wp-content/uploads/2016/11/ACLU_BodyCameras_11.21_final.pdf; *The War on Marijuana in Black and White: A Massachusetts Update* (Oct. 2016), aclum.org/sites/default/files/tr-report-10-2016-final-with-cover.pdf; *Back to the Drawing Board: Student Privacy in Massachusetts K-12 Schools* (Oct. 2015), aclum.org/sites/default/files/wp-content/uploads/2015/10/back_to_the_drawing_board_report_large_file_size.pdf; *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010* (Oct. 2014), aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf; *Our Homes are Not Battlefields: Reversing the Militarization & Federalization of Local Police in*

for Justice website which provides analysis of public records obtained by ACLUM.² As previously described, ACLUM's regular means of disseminating information also include: a website with approximately 150,000 visitors every year; various publications; an email newsletter to more than 100,000 subscribers; two blogs; social media accounts with more than 50,000 total followers; and educational events and regular public speaking engagements.³ ACLUM's website, blogs, and other publications are widely available to the public at no cost.

These characteristics are typically sufficient to convey “representative of the news media” status. Courts have held that “[i]t is critical that the phrase ‘representative of the new media’ be broadly interpreted if the act is to work as expected ... I[n] fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’” *Electronic Privacy Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10 (D.D.C. 2003).

2. The records sought are in the public interest and ACLUM has no commercial interest in the disclosure.

ACLUM is also entitled to a waiver or reduction of fees, since “[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” and such disclosure “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 28 CFR § 16.11(k)(1)(i) and (ii).

This request aims to further public understanding of government policies and conduct that profoundly impact human lives. Through this request, ACLUM seeks to help the public understand how the public health authority of 42 U.S.C. § 265—whose 128 words were last modified in 1944—came to be used to override U.S. immigration laws and expel asylum seekers at the border without any legal process or screening. Though news reports have indicated that Trump administration officials—more interested in immigration restrictions than public health—forced the Title 42 process onto the CDC over the objection of the agency’s scientists,⁴ the Biden Administration has

Massachusetts (June 2014), aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-our-homes-are-not-battlefields.pdf; *see also* aclum.org/reports.

² *See* data.aclum.org.

³ *See, e.g., The Future of Freedom: Action Report* (“2018 Annual Report”), aclum.org/sites/default/files/aclum_2018_annual_report_full.pdf; On Liberty, aclum.org/en/on-liberty; Privacy SOS, privacysos.org; facebook.com/aclumass/; twitter.com/ACLU_Mass; instagram.com/aclu_mass/; youtube.com/channel/UC14AFyqfizR4gMAMa8KIZ3A; aclum.org/en/civil-liberties-minute.

⁴ *See, e.g., Pence Ordered Borders Closed After CDC Experts Refused*, AP News (Oct. 3, 2020), apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263

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announced it will continue to implement the Title 42 process to expel asylum seekers at the border.⁵

ACLUM is a non-profit whose sole purpose is to protect civil rights and liberties for all persons in Massachusetts. It has no commercial interest in the information.

Conclusion

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

Please reply to this request by contacting Krista Oehlke at koehlke@aclum.org or 617-482-3170 x 353. We look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i).

Sincerely,

/s/ Krista Oehlke
Krista Oehlke
Legal Fellow
ACLU of Massachusetts

/s/ Adriana Lafaille
Adriana Lafaille
Staff Attorney
ACLU of Massachusetts

815a26f8aa17f6ea490ae; *CDC Officials Objected to Order Turning Away Migrants at Border*, Wall St. J. (Oct. 3, 2020), [wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601](https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601); *Inside the Fall of the CDC*, ProPublica (Oct. 15, 2020), [propublica.org/article/inside-the-fall-of-the-cdc](https://www.propublica.org/article/inside-the-fall-of-the-cdc); *How Trump Officials Used COVID-19 to Shut U.S. Borders to Migrant Children*, CBS News (Nov. 2, 2020), [cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19](https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19).

⁵ Press Briefing by Press Secretary Jen Psaki (Feb. 10, 2021), [whitehouse.gov/briefing-room/press-briefings/2021/02/10/press-briefing-by-press-secretary-jen-psaki-february-10-2021](https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/10/press-briefing-by-press-secretary-jen-psaki-february-10-2021).