

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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NO MORE DEATHS and
CENTER FOR CONSTITUTIONAL
RIGHTS,

Plaintiffs,

v.

Civil Action No. 21-cv-954

UNITED STATES CUSTOMS
AND BORDER PROTECTION

Defendant

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, for injunctive and other appropriate relief, seeking the immediate processing and release of agency records requested by Plaintiffs Center for Constitutional Rights (“CCR”) and No More Deaths (“NMD”) (collectively “the Requesters” or “Plaintiffs”) from Defendant United States Customs and Border Protection (“CBP”). Plaintiffs sent the request on April 19, 2019—over twenty months ago—and yet CBP has failed to produce a single document or provide any meaningful indication of when it intends to do so.

2. On April 19, 2019, the Requesters filed a FOIA request with the Department of Homeland Security (“DHS”) and CBP. The request sought records relating to CBP’s Joint Intelligence Operations Center (“JIOC”) and CBP’s “BORSTAR”¹ unit, specifically their role in responding to requests for emergency assistance from/relating to distressed migrants along the

¹ BORSTAR refers to Border Patrol’s Search, Trauma, and Rescue Unit. Border Patrol is a component agency of CBP.

U.S.-Mexico border, particularly in and around the Tucson Sector.²

3. This request aims to shed light on a grave and ongoing humanitarian crisis at our southwestern border. Each year hundreds, if not thousands of migrants die traversing the unforgiving terrain in and around the greater-Sonoran Desert region. According to official government records, the remains of at least eight thousand migrating people have been found in U.S. deserts since 1994; tens of thousands more have disappeared. The severity of the issue illustrates the urgent need for government transparency in this realm.

4. Arizona’s Pima County Sheriff’s Department (“PCSD”), charged with responding to calls for emergency assistance within its jurisdiction, currently transfers many of its emergency “911” calls for search and rescue assistance directly to Border Patrol instead of handling them in-house or transferring them to the county rescue services.³ Many other counties have followed suit.⁴ A significant majority of the time, PCSD transfers calls for emergency assistance from Spanish-speaking individuals—many of whom are migrants—to Border Patrol, at which point PCSD discharges its responsibilities over the search and rescue operation.

5. This referral system has effectively transformed Border Patrol into the de facto emergency services provider for migrants in the greater-Tucson border area. Diverting migrants into a separate emergency services system on the basis of their imputed immigration status, nationality, and language raises serious constitutional concerns. To make matters worse, because PCSD routinely assigns its responsibilities over missing persons to Border Patrol, Border Patrol

² The term “Tucson Sector” refers to the operative Border Patrol section spanning 262 miles of linear border running east from Yuma County, Arizona to the Arizona/New Mexico state line.

³ Puck Lo, *For migrants in Arizona who call 911, it’s Border Patrol on the line*, Al Jazeera (Mar. 25, 2018), <http://america.aljazeera.com/articles/2015/3/25/for-migrants-in-arizona-who-call-911-its-border-patrol-on-theline.html>

⁴ *Id.*

then becomes the sole informational source for family members of missing persons. Although Border Patrol's BORSTAR Unit is tasked with the search and rescue-operation, it is impossible to ascertain the status of the request for assistance because Border Patrol has historically and habitually withheld this information during the pendency of search operations, as well as after. This opacity has frustrated the search and rescue process and denied countless individuals the opportunity for life-saving assistance.

6. Hundreds—potentially thousands—of individuals die annually in the area abutting the U.S. side of the U.S.-Mexico border.⁵ The public has a right to understand the scope, nature, and parameters of this agreement, the right to assess the U.S. government's capacity to serve as a de facto emergency service provider, and the right to analyze the efficacy with which it has done so. This is especially so where state and local search and rescue services have deferred to their federal counterparts. Such information is critical to ensuring government transparency and the public's ability to hold the government accountable.

7. Now, more than twenty months after the issuance of the Request, CBP has demonstrated no intent to undertake production, instead content to delay indefinitely. Last year, after Plaintiffs submitted their request, CBP inexplicably assigned three separate tracking numbers to Plaintiffs' singular request, delaying the production timeline. After consolidating the requests at Requestors' behest, although CBP informed CCR that it was processing Plaintiffs' requests, CBP failed to provide any meaningful information concerning the scope of the documents that it

⁵ Tara Brian and Frank Laczko, "Migrant Deaths around the World in 2015," in *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants*, eds. Tara Brian and Frank Laczko, (International Organization for Migration, 2016), 16. <https://publications.iom.int/books/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>. Anne Flaherty, *More than 260 migrants died trying to cross the US southern border: Report*, ABC News (Dec. 14, 2018), <https://abcnews.go.com/International/260-migrants-died-cross-us-southern-border-report/story?id+59832675>

intends to produce, whether it intends to withhold any documents, and, if so, the exemptions under which it would seek to justify such a withholding.

8. CBP has not only refused to provide Plaintiffs with an approximate production date, CBP has refused to provide any update whatsoever since May 2020. CBP has continually refused to provide meaningful, accurate information on which Plaintiffs may rely to assess CBP's intent to comply with its statutory-imposed obligations.

9. This action is necessary to rectify CBP's failure to respond meaningfully to CCR's requests. Accordingly, this case seeks declaratory relief that CBP is in violation of the FOIA for failing to fulfill CCR's requests for records and injunctive relief ordering CBP to comply immediately and fully with CCR's request under the FOIA.

Jurisdiction and Venue

10. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B), because a plaintiff resides in this district.

11. Because Defendant has failed to comply with the time limits imposed by the FOIA, Plaintiffs have exhausted their administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i). Plaintiffs are therefore entitled to appeal directly to this Court for relief. 5 U.S.C. § 552(a)(4)(B).

Parties

12. Plaintiff No More Deaths is a humanitarian-aid organization based in Southern Arizona. NMD engages in a number of direct-aid projects in the border region, including delivering water, food, and medical aid to those crossing through the Sonoran Desert; conducting community search and rescue operations for border crossers in distress; and providing phone

services to those who have been recently deported to Mexico. No More Deaths formed in 2004 in coalition with community and faith-based groups to, among other things, end migrants' deaths in the desert across the U.S.-Mexican border. No More Deaths builds on a decades-long history of providing aid to those fleeing conflict by offering sanctuary in response to federal immigration policies. For decades, the sanctuary movement has advocated for migrants in need of asylum and against federal immigration policies that seek to punish migrants seeking refuge from violence, poverty, and oppression. One of the organization's key functions is reporting on and publishing key findings relating to abuses within the immigration system, including fact sheets, newsletters, mailing lists, and photographic and video reports.

13. Plaintiff Center for Constitutional Rights is a non-profit, public interest, legal and public education organization that engages in litigation, public advocacy, and the production of publications. CCR's diverse dockets include litigation and advocacy around immigration enforcement policies, policing, and racial and ethnic profiling. CCR's primary activities include the publication of newsletters, know-your-rights handbooks, and legal analysis of current immigration law issues for public dissemination, all of which are freely available to the public. In addition, CCR regularly issues press releases and operates an e-mail list of over 50,000 members. The office and principal place of business of CCR is located in New York County, New York.

14. Defendant CBP is an agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant U.S. Customs and Border Protection is a component of DHS and is a federal agency within the meaning of 5 U.S.C. § 552(f)(1). The U.S. Border Patrol is a subcomponent within CBP and is described "as vigilant protectors of our Nation's borders." Border Patrol's Search, Trauma, and Rescue ("BORSTAR") Unit is the only national law enforcement search and rescue entity with the capability to conduct tactical medical, search, and rescue training for Federal, state, local and

international government agencies.

15. Plaintiffs are informed and therefore believe that Defendants have possession, custody, or control of the requested records.

Statutory Framework

16. Per 5 U.S.C. § 552, the FOIA requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

17. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether to fulfill the request and the Requesters' right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

18. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

19. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5. U.S.C. § 552(a)(4)(B).

Background

20. This request aims to shed light on a grave and ongoing humanitarian crisis at our southwestern border. Each year, hundreds, if not thousands of migrants die traversing the unforgiving terrain in and around the greater-Sonoran Desert region. According to official government records, the remains of at least eight thousand migrating people have been found in U.S. deserts since 1994; tens of thousands more have disappeared. The terrain is harsh and unforgiving. As reported by the nonprofit organization Physicians for Human Rights, the majority

of deaths are related to elemental exposure: deaths due to environmental heat exposure represent approximately 73 percent of migrant deaths in this area. According to the Colibrí Center for Human Rights, which assists missing migrants across the southwest, over 1,200 sets of human remains have been recovered over the past two decades in Arizona alone. Last year was the deadliest on record for migrants crossing into the United States through the Arizona desert, with the remains of 227 individuals found along the border.

21. Plaintiffs seek access to these records to inform the public about the government's role in creating, contributing to, and exacerbating this crisis. Beginning in 1994, Border Patrol, a subcomponent of CBP and the federal agency charged with providing emergency services at the U.S. border, implemented a "Strategic Plan" to "force [migrants to cross] over more hostile terrain." Border Patrol's enforcement policy—still in place today—is to police unauthorized migration across the southern border by pushing those crossing into remote deserts where they may "find themselves in mortal danger." CBP, which tracks the hundreds of thousands of individuals who seek access to the U.S. immigration system through the interior of the country every year, is thus responsible for searching for and rescuing the very same individuals the agency has intentionally funneled into life-threatening conditions.

22. An initial review of NMD-collected data suggests that Border Patrol has struggled to carry out its search and rescue responsibilities. NMD reviewed hundreds of emergency cases of lost or missing migrants in the U.S. borderlands, concluding that in 63% of all distress calls referred to Border Patrol, the agency did not conduct any confirmed search or rescue mobilization. In one instance, when an individual who was "lost, alone, and very tired" after wandering for nine days in the South Texas brush, a Border Patrol agent told a crisis-line volunteer that "the volunteer needed to send a formal request for a search through postal mail" before a search would begin.

When the volunteer questioned his reasoning given the time-intensive nature of the search and rescue emergency, the Border Patrol agent said that he couldn't help with a faster response "because it was a Sunday." In most of the NMD-documented emergency cases, Border Patrol searches lasted for less than a day, and in some cases, less than an hour. No search lasted for more than three days.

23. Where Border Patrol *does* initiate a search and rescue operation—sometimes through its BORSTAR Unit—the initial data suggest that such searches are alarmingly ineffective, especially in comparison with government search and rescue standards for cases involving U.S. citizens. Local human rights organizations that conducted a qualitative study on Border Patrol emergency services found that agents interfered with family and humanitarian search efforts in at least 114 emergencies, or an average of a fourth of all cases over a two-year period. Further, Border Patrol does not appear to follow any consistent protocol that reflects the time-sensitive exigencies of search and rescue requests. The agency's wildly inconsistent emergency response times demonstrate an erratic and diminished regard towards the preservation of human life.

24. When Border Patrol does take action in response to a reported emergency, it is often because consulates and families have gone to great lengths to pressure the agency to mobilize. Worse still, Border Patrol often employs extremely dangerous enforcement methods when encountering migrants in the field, including chase-and-scatter, a dangerous method in which Border Patrol agents chase migrants through remote terrain and utilize the landscape as a weapon to slow down, injure, and apprehend them. This method that often causes migrants in need of assistance to go missing in the first place. The available evidence suggests that the problem is systemic, pervasive, and ubiquitous.

25. NMD has compiled data sets through its volunteer-led search and rescue

coordination efforts. Without NMD's efforts, the public would have almost *no* information whatsoever on Border Patrol's search and rescue operations because neither the public nor family members of the missing individuals can obtain meaningful information regarding searches and rescues. It is a veritable black box. One Border Patrol agent testified in federal court that when a civilian calls Border Patrol—for instance to report a missing loved one—the agency would not commit to responding to the civilian with any information “[b]ecause we are a law enforcement agency. We still have operational commitments that we have to make, and we don't want to give out information that we don't have to give out, because we still have to operate, and there's some operational security, so to speak, that we have to keep in mind. If we start giving out information to the general public, it would kind of compromise some of our operations.” Border Patrol releases almost no information to the public regarding the efficacy of its efforts, and has not done so for quite some time. Recognizing the problem, in 2017 the U.S. Congress mandated that Border Patrol report on its search and rescue activities for the previous year. However, the report that Border Patrol released contained only a number of “rescues,” without any data on the number of emergency reports the agency received, nor the number of searches it performed. There is no clarification as to what constitutes a “rescue,” and there have been no further Border Patrol reports on its search and rescue efforts since.

26. Likewise, the agency refuses to release information regarding what resources Border Patrol mobilizes in response to reported emergencies; the quality, duration, and scope of Border Patrol-led search and rescue efforts; and the ultimate outcome of cases transferred to Border Patrol. Whether the person in distress survived, died, or disappeared is also unknown. All told, there has been no quantitative data to suggest that the federal border enforcement agency is capable of responding swiftly and meaningfully to the masses of emergency calls in the borderland,

prioritizing apprehension tactics over emergency services.

27. Despite the gravity and lethality of the crisis, compared to other injustices at our southwest border this particular issue has failed to gain commensurate national attention until fairly recently. Recognizing this gravity, in late 2020, Congress passed the Missing Persons and Unidentified Remains Act, a bipartisan legislation to acknowledge and mitigate the extraordinary loss of life in the borderlands. The law provides a mechanism to fund state and local governments, humanitarian organizations, forensics labs, and medical officers that respond to migrant deaths on a day-to-day basis, while also calling for the implementation of nearly 200 new rescue beacons along the border. Critically, the Missing Persons and Unidentified Remains Act requires CBP and other agencies to submit annual reports with a range of objectives, including data on the total of migrant lives lost on the border and assessments of government efforts to identify and resolve the cases of missing and dead migrants.⁶ The need for such accountability is paramount.

28. The increased scrutiny on government enforcement of immigration policy, especially at the U.S.-Mexico border, in tandem with a palpable and growing national interest in immigrant justice creates an urgent need for information on how CBP provides emergency humanitarian services at the border. This information is necessary for an accurate assessment of how CBP responds to emergency calls, its processing and reporting protocols, its metrics and data-collecting practices, its methods for search and rescue operations, and its policies and procedures when it discovers missing human remains.

The FOIA Request and CBP's Failure to Respond

29. On April 19, 2019, the Requesters submitted a FOIA request to DHS and CBP

⁶ S.2174, Missing Persons and Unidentified Remains Act of 2019. 116th Congress (2019-2020). Available at: <https://www.congress.gov/bill/116th-congress/senate-bill/2174/text>

seeking records related to Border Patrol's search and rescue operations in the Tucson Sector. *See* Exhibit A. Requesters transmitted the request to each agency via email and, as a courtesy, a hardcopy request to each agency via Federal Express.

Specifically, the request sought:

- Records of any communications between Border Patrol personnel and local law enforcement agencies in the Tucson Sector regarding BORSTAR and/or search and rescue operations.
- Data regarding the aggregate number of requests for assistance from local law enforcement agencies.
- Data regarding each individual search and rescue operation conducted by BORSTAR agents or other Border Patrol personnel.
- Protocols and materials relating to the system of classifications used for requests of assistance, and protocols and materials for initiating, conducting, and recording a search and rescue operation.
- Records reflecting arrangements for cooperation or communication with local law enforcement agencies regarding the handling of 911 calls, BORSTAR and/or search and rescue operations.

30. Requesters applied for expedited processing, on the grounds that there is a "compelling need" for these records under 5 U.S.C. § 552(a)(6)(E)(i)(I) because the information requested is "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public about the legality of the EO." Exhibit A.

31. Requestors also applied for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that "disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the Requester[s]." Exhibit A. Requesters also relied on 5 U.S.C. § 552(a)(4)(A)(iii) on grounds that CCR and NMD qualify as

“representatives of the news media,” and whose purpose in requesting the information is to disseminate it freely and publicly.

32. On April 19, 2019, DHS sent a letter via email to CCR attorney Angelo Guisado acknowledging receipt of the FOIA request. Per the letter, DHS transferred the request to CBP, and provided a telephone number at which to reach DHS regarding the status of the request. No notice from CBP was sent to Requesters between April 19 and May 31, 2019.

33. For each tracking number, CBP provided a different estimated date of completion, none of which comply with CBP’s statutory obligations under the FOIA. CBP failed to consolidate the request under a single tracking number—and therefore failed to begin processing the request—for three months after the FOIA request was filed. As a result, it failed to begin processing the request during that time.

CBP-2019-046254

34. CBP’s online FOIA portal reflects that the request tracking number CBP-2019-046254 was “submitted” on April 19, 2019. As of the date of this complaint, no electronic notice was transmitted to Requesters.

35. On May 20, 2019, thirty-one days after the FOIA request was filed, CCR attorney Angelo Guisado called DHS’s FOIA hotline to inquire as to the status of the request. A DHS employee informed him that they had transferred the request to CBP and, accordingly, also transferred the call to that office. After the call was transferred, a CBP employee confirmed that the agency had received the request, that it was “in the queue,” and that it had been assigned the number “CBP-2019-046254.” The CBP employee estimated that processing the request could take six months, though they could not provide a more definite timeframe.

36. On May 29, 2019, forty days after the FOIA request was filed, Mr. Guisado called

CBP again to inquire about the status of “CBP-2019-046254.” A CBP employee who identified herself as “Ms. Johnson” stated that the request was still being processed. When Mr. Guisado stated that the Requesters had requested expedited processing, Ms. Johnson responded that she would assign someone to look into the matter and follow up.

37. As of the date of this complaint, no follow-up regarding the request for expedited processing has been provided.

CBP-2019-056580

38. On May 31, 2019, 42 days after the FOIA request was filed, CBP’s online FOIA portal emailed CCR attorney Angelo Guisado with an automated message confirming receipt of a FOIA request “submitted” on May 31, 2019. The message described the records sought as “[i]nformation relating to the CBP’s Joint Intelligence Operations Center (JIOC) and BP’s “BORSTAR” unit, specifically their role in responding to requests for emergency assistance along the U.S.-Mexico border, particularly in and around the Tucson, Arizona region.” CBP assigned the request the tracking number “CBP-2019-056580,” distinct from the tracking number “CBP-2019-046254,” which CBP assigned to the same request on May 20, 2019.

39. On June 3, 2019, 45 days after the FOIA request was filed, CBP emailed CCR a notice acknowledging receipt of a FOIA request tracking number “CBP-2019-056580,” “received on 05/31/2019 requesting all records related to Border Patrol’s practice of assisting migrants through search and rescue operations in the Tuscon (sic) Sector carried out by BORSTAR, or by other Border Patrol personnel within the Tucson Sector.”

40. The June 3, 2019, notice stated that CBP would charge Requesters “for records in accordance with the DHS FOIA regulations outlined on the DHS website,” and that, “[b]y submitting your request, you have agreed to pay up to \$25.00 in applicable processing fees, if any

fees associated with your request exceed this amount, CBP shall contact you.”

41. The June 3, 2019, notice further stated that due to “the increasing number of FOIA requests received ... [CBP] may encounter some delay in processing [the] request.” Citing 6 C.F.R. Part 5 § 5.5(a) of the DHS FOIA regulations, CBP stated that it would process “FOIA requests according to their order of receipt.” It went on to state that although “CBP’s goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 §5.5(c).”

CBP-2019-061372

42. On June 19, 2019, 61 days after the FOIA request was filed, CBP’s online FOIA portal emailed CCR attorney Angelo Guisado with a message confirming receipt of a FOIA request “submitted” on April 26, 2019. The message described the records sought as “information relating to the CBP Joint Intelligence Operations Center and BP’s BORSTAR unit. Specifically their role in responding to requests for emergency assistance along the US border, specifically around (sic) the Tucson, AZ region.” CBP assigned the request the tracking number “CBP-2019-061372,” distinct from both “CBP-2019-046254,” assigned May 20, 2019, and “CBP-2019-056580,” assigned June 3, 2019, which related to the same original request. The automated message was functionally identical to the message sent on June 3, 2019, described in Paragraph 39, *supra*.

43. On July 13, 2019, 85 days after the FOIA request was filed, CBP emailed CCR attorney Angelo Guisado a notice acknowledging receipt of a FOIA request tracking number “CBP-2019-061372,” “received on 04/26/2019 in which you are seeking records pertaining to CBP’s Joint Intelligence Operations Center and BORSTAR unit.”

44. The July 13, 2019, notice was functionally identical to the message sent on June 3, 2019, described *supra*, with one exception. In this notice, CBP added that its “FOIA Division is

working hard to reduce the amount of time necessary to respond to FOIA requests. Currently, the average time to process a FOIA request related to “travel/border incidents” is a minimum of 3-6 months.”

Consolidation

45. On July 19, 2019, 91 days after the FOIA request was filed, CBP emailed CCR attorney Angelo Guisado a notice that acknowledged receipt of a FOIA request “submitted” on April 19, 2019. The notice additionally informed Mr. Guisado that CBP was closing tracking the requests under tracking numbers “CBP-2019-056580” and “CBP-2019-061372.” The July 19, 2019, notice was functionally identical to the message sent on July 13.

46. On July 19, 2019, 91 days after the FOIA request was filed, CBP emailed CCR attorney Angelo Guisado and requested search terms to aid in its search for the information requested by Plaintiffs. CCR provided initial search terms on July 24, 2019, 96 days after the FOIA request was filed. However, negotiation of search terms took over two months due to agency delay. CBP regularly failed to respond to emails for weeks at a time. CBP did not begin searching for the information requested until September 20, 2019, 155 days after the FOIA request was filed.

47. On October 9, 2019, CCR emailed CBP. CCR requested an update on the FOIA request. CCR also stated that it had received a notice from the Administrative FOIA Office. The notice informed CCR that the Administrative FOIA Office was granting a request for expedited processing and had determined a request for fee waiver was “not applicable.” The Administrative FOIA Office listed on the notice a tracking number previously unknown to the Requesters (CBP-2019-086152). CCR asked for clarity regarding the status of its requests for expedited processing and for a fee waiver. As of the date of this complaint, CBP has failed to respond to these questions despite follow-up from CCR.

48. After beginning the search, CBP has refused to provide any meaningful update to Plaintiffs, despite follow-up emails from CCR. After CBP failed to respond to CCR's October 9, 2019 email, CCR again requested an update from CBP on October 16, 2019. On October 17, 2019, 182 days after the FOIA request was filed, CBP provided confirmation that the search was ongoing but failed to provide any further information. On October 19, 2019, CCR responded, again requesting an update. CCR additionally requested a determination on Plaintiffs' Requests for Fee Waiver and Expedited Processing. On October 21, 2019, CBP stated that the search "is estimated to be completed [by] the end of November." CBP failed to provide a determination regarding Plaintiffs' Requests for Fee Waiver and Expedited Processing. Had CBP's timeline estimate been accurate, CBP would not have completed searching for the documents until two months after the search began, 226 days after the FOIA request had been filed. CBP would not have been able to produce the documents until much later, after the agency reviewed the documents for FOIA exceptions. To the Requesters' knowledge, CBP never completed the search.

49. Despite further follow-up from CCR, CBP has to date provided no meaningful information regarding Plaintiffs' FOIA request. On November 23, 2019, CBP responded to CCR's request for an update on the search by confirming that the search was ongoing. On December 23, 2019, CBP responded to yet another request for an update by asserting that the agency would provide a status update to Requesters. The agency never provided such an update. After the December 23, 2019 email, CBP failed to respond to any further communications for 39 days, despite repeated follow-up from CCR.

50. On January 23, 2020, 280 days after the FOIA request was filed, CCR sent a letter by mail and email to CBP requesting a response to its FOIA request, and its request for expedited processing, by February 13, 2020. On January 31, 2020, CBP emailed CCR attorney Angelo

Guisado acknowledging CCR's request for status update but provided no further information.

51. On May 7, 2020, CCR contacted CBP for yet another status update. CBP acknowledged that it did "have some records, the email files have not yet but (sic) converted for processing, and unfortunately there are still several requests ahead of yours for processing." CBP has provided no further update in the almost nine months that have elapsed.

52. Over 650 days have passed since the Requesters submitted their initial request, and to date the Requesters have not received any documents from CBP. On CBP's own FOIA portal, the estimated date to complete the request is listed as August 22, 2019, eighteen months ago. CBP has failed to indicate which records, if any, it intend to disclose and has, on multiple occasions, extended its estimated date for processing the request. CBP has refused to provide Requesters with meaningful updates on their FOIA request, including a repeated failure to respond to communications for weeks at a time. The totality of CBP's communications cannot possibly satisfy the spirit or letter of the FOIA statute, especially not the "expedited processing" provision.⁷

53. Because CBP has failed to respond to Plaintiffs' request within the statutory timeframe, Plaintiffs are deemed to have exhausted their administrative remedies with respect to their Request to CBP. 5. U.S.C. § 522(a)(6)(C)(i).

PLAINTIFFS' CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Failure to Promptly Notify the Requestor of Agency's Determination and Right to Appeal

⁷ The D.C. Circuit Court of Appeals has held that an agency "must at least inform the Requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions. . . . It is not enough that, within the relevant time period, the agency simply decide to later decide." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 182 (D.C. Cir. 2013).

54. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 53 as if repeated and incorporated herein.

55. Plaintiffs have a legal right under FOIA to be notified of the agency's "determination and reasons therefore," and if the agency has made an adverse determination, "the right of such person to appeal to the head of the agency." 5 U.S.C. § 552(a)(6)(A)(i). Further, an agency's determination must: (i) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (ii) inform the Requester that it can appeal whatever portion of the "determination" is adverse. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 186.

56. There is no evidence that CBP has gathered and reviewed the documents Plaintiffs requested; CBP has not determined or communicated the scope of documents it intends to produce and withhold, nor the reasons for withholding said documents; nor has CBP informed the Requesters of their right to appeal. Further, CBP has failed to respond to communications from CCR for weeks at a time. As of the date of this complaint, CBP continues to fail to provide any status update on Plaintiffs' FOIA request.

57. Defendant's failure to notify Plaintiffs of its determination violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the corresponding agency regulations.

SECOND CLAIM FOR RELIEF

Failure to Produce Records Under the FOIA

58. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 53 as if repeated and incorporated herein.

59. Through their April 19, 2019 FOIA request, Plaintiffs properly asked for records within CBP's control.

CBP has neither produced any records to Plaintiffs in response to their request, nor made

any explicit and justified claims of statutory exemption. Further, CBP refuses to provide a status update on Plaintiffs' FOI request. Indeed, CBP has failed to respond to communications from Plaintiffs for weeks at a time.

60. CBP's failure to promptly make records available in response to Plaintiffs' Request violated the Plaintiffs rights under the 5 U.S.C. § 552(a)(3).

THIRD CLAIM FOR RELIEF

Failure to Provide Expedited Processing

61. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 53 as if repeated and incorporated herein.

62. The Requesters have grounds for expedited processing because the information sought relates to "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(d)(1)(iv), and because there is "[a]n urgency to inform the public about an actual or alleged federal government activity" by organizations "primarily engaged in disseminating information," 28 C.F.R. § 16.5(d)(1)(ii).

63. CBP has violated Plaintiffs' rights to expedited processing under 5 U.S.C. § 552(a)(6)(E) and CBP's own regulations, 6 C.F.R. § 5.5(d). "If the agency does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 189. "It is not enough that, within the relevant time period, the agency simply decide to later decide." *Id.*

64. CBP has allowed over 650 days to elapse since the initial FOIA request without making any determination or producing any documents in response to the request. This far exceeds the 30-day limit allotted for expedited processing under 5 U.S.C. § 552(a)(6)(E). In addition, CBP

has created an unreasonable delay in every step of the process that it has been willing to pursue. CBP failed to resolve the agency-created problem of duplicate tracking numbers until 91 days after the FOIA request was filed. As a result, the agency also did not begin processing the request or request search terms from Plaintiffs during this time. The agency then failed to begin the search until 2 months later, 155 days after the FOIA request was filed. CBP also failed to provide a timeline for the search until a month after that, 186 days after the FOIA request was filed. During email correspondence, CBP regularly failed to respond to CCR's emails for weeks at a time. Finally, CBP has failed to provide meaningful updates on Plaintiffs' FOIA request since undertaking the search.

65. Furthermore, CBP has failed to answer Plaintiffs' inquiries regarding their request for expedited processing. On October 10, 2019, CCR emailed CBP requesting an update on the status of its request for expedited processing. On October 19, 2019, CCR again emailed CBP requesting a determination on its request. On January 23, 2020, CCR sent yet another letter to CBP requesting the same. CBP never responded to these requests.

66. Because CBP has not provided a complete response to the Request, this Court has jurisdiction under the FOIA, 5 U.S.C. § 552(a)(6)(E)(iv) to review CBP's failure to make a determination concerning Plaintiffs' request for expedited processing.

FOURTH CLAIM FOR RELIEF

Failure to Respond to Plaintiffs' Request for a Fee Waiver

67. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 53 as if repeated and incorporated herein.

68. Plaintiffs requested a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the

operations or activities of the government and is not primarily in the commercial interest of the requester.”).

69. CBP has never made a determination regarding Plaintiffs’ request for a fee waiver. In addition, CBP has refused to answer Plaintiffs’ inquiries regarding their request for a fee waiver. On October 10, 2019, CCR emailed CBP requesting an update on the status of its request for a fee waiver. On October 19, 2019, CCR emailed CBP requesting a determination on its request. On January 23, 2020, CCR sent a third letter to CBP requesting the same. CBP never responded to these requests.

70. By refusing to make a determination regarding Plaintiffs’ request for a fee waiver, CBP has violated Plaintiffs’ rights to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and CBP’s own regulations, 6 C.F.R. § 5.11(k).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- 1) Declare that the Defendant violated the Freedom of Information Act by failing to lawfully satisfy Plaintiffs’ April 19, 2019 FOIA requests;
- 2) Order Defendant to immediately make a full, adequate, and expedited search for the requested records;
- 3) Order Defendant to engage in expedited processing in this action;
- 4) Enjoin Defendant from assessing fees or costs for the processing of the FOIA Request;
- 5) Order Defendant, upon completion of expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiff no later than ten days after the Court’s order;

6) Award Plaintiff costs and reasonable attorney's fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and

7) Grant each other and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: February 3, 2021
New York, New York

_____/s/ Angelo Guisado_____

Angelo Guisado
CENTER FOR CONSTITUTIONAL RIGHTS
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New York, NY 10012
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Attorney for Plaintiffs

EXHIBIT A



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April 19, 2019

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive, SW, Building 410
Stop – 0665
Washington, D.C. 20528-0655

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NW
9th Floor, Mail Stop 1181
Washington, DC 20229

Re: Freedom of Information Act Request/Expedited Processing Requested

Dear FOIA Officers:

This is a request under the Freedom of Information Act, 5 U.S.C. Sec. 552 (“FOIA”), on behalf of No More Deaths (“NMD”) and the Center for Constitutional Rights (“CCR”) (collectively “the Requesters”) for information from the Department of Homeland Security (“DHS”), the U.S. Customs and Border Protection (“CBP”), relating to policies and practices carried out by the U.S. Border Patrol (“Border Patrol”), Tucson Sector, along the U.S.-Mexico border.

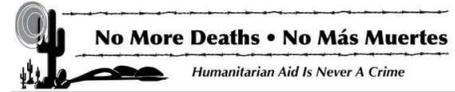
A. Purpose of Request

This request seeks information relating to the CBP’s Joint Intelligence Operations Center (“JIOC”) and BP’s “BORSTAR” unit, specifically their role in responding to requests for emergency assistance along the U.S.-Mexico border, particularly in and around the Tucson, Arizona region. According to Border Patrol estimates, from 1998 to 2015, more than 6,500 migrants died on the U.S. side of the border, with an annual rate of approximately 250 to 500 migrant deaths.¹ Many more remain uncounted. As reported by the nonprofit organization Physicians for Human Rights, the majority of deaths are related to exposure to the elements, with

¹ Tara Brian and Frank Laczko, “Migrant Deaths around the World in 2015,” in *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants*, eds. Tara Brian and Frank Laczko, (International Organization for Migration, 2016), 16. <https://publications.iom.int/books/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>.



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one study based on coroners' reports estimating that deaths due to environmental heat exposure represent approximately 73 percent of deaths of migrants crossing between ports of entry.² This issue is ongoing and urgent.³ Many of these individuals have fled persecution in their home countries with the aim of seeking asylum in the United States. Due to the government's restriction of access to the asylum process at official ports of entry—often referred to as “metering”⁴—an increasing number⁵ of individuals are left with no choice but to cross in between ports of entry, often travelling through the dangerous terrain of the Tucson sector to do so.

According to CBP, BORSTAR was “created in 1998 in response to,” among other things, “migrant deaths along our nation’s borders.”⁶ Although CBP represents that BORSTAR is empowered to conduct “tactical medical, search and rescue training,”⁷ the alarming number of migrant deaths under its watch merits closer scrutiny. Policies, procedures, and protocols are vital to provide clarity as to the causes and effects of this humanitarian crisis. Further, certain CBP and BP-initiated policies and practices may have actually forced individuals into the very situations that BORSTAR was designed to combat: according to the 1994 U.S. Border Patrol Strategic Plan, changes to enforcement infrastructure and practices would ideally “force [migrants to cross] over more hostile terrain, less suited for crossing and more suited for enforcement.”⁸ The public deserves to know the extent to which the federal government is responsible for this crisis and the methods, if any, which it intends to take to ameliorate it.

Government transparency is necessary not only in regards to how those individuals in need of rescue are treated, but how DHS and CBP interact with volunteers who come to their assistance as well. The Department of Justice recently prosecuted four NMD members for providing humanitarian assistance to these individuals in the Tucson sector: the alleged illegal conduct was leaving jugs and canned food for at-risk individuals potentially stranded in the desert.⁹ Beyond

² Kathryn Hampton, MSt, *Zero Protection: How U.S. Border Enforcement Harms Migrant Safety and Health*, Physicians for Human Rights (Jan. 10, 2019), https://phr.org/resources/zero-protection-how-u-s-border-enforcement-harms-migrant-safety-and-health/#_ednref11 (citing Sanjeeb Sapkota et al, *Unauthorized Border Crossings and Migrant Deaths: Arizona, New Mexico, and El Paso, Texas, 2002–2003*, *American Journal of Public Health* 96, 7 (2006): 1284).

³ Anne Flaherty, *More than 260 migrants died trying to cross the US southern border: Report*, ABC News (Dec 14, 2018), <https://abcnews.go.com/International/260-migrants-died-cross-us-southern-border-report/story?id=59832675>

⁴ Ron Nixon, *Asylum Claims Jump Despite Trump’s Attempt to Limit Immigration*, *New York Times* (Dec 10, 2018), <https://www.nytimes.com/2018/12/10/us/politics/trump-asylum-border-.html>

⁵ Julia Ainsley, *Since Trump restricted flow at border, more migrants trying to sneak through undetected*,

⁶ U.S., Customs and Border Protection, *Border Patrol Search, Trauma, and Rescue (BORSTAR)* (last visited Mar. 25, 2019), <https://www.cbp.gov/sites/default/files/documents/Border%20Patrol%20Search%2C%20Trauma%2C%20and%20Rescue.pdf>

⁷ *Id.*

⁸ “*Border Patrol Strategic Plan: 1994 and Beyond*,” U.S. Border Patrol, July 1994, (last visited Mar. 25, 2019), <http://cw.routledge.com/textbooks/9780415996945/gov-docs/1994.pdf>.

⁹ Kristine Phillips, *They left food and water for migrants in the desert. Now they might go to prison*, *Washington Post* (Jan. 20, 2019) https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/?utm_term=.3d93775d7fc0



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prosecuting these individuals, the Border Patrol often takes matters in their own hands. Recently, the Washington Post published a video of Border Patrol agents dumping out gallon water jugs left for dehydrated migrants.¹⁰ From 2012 to 2015, humanitarians recorded a total of 3,586 vandalized gallon jugs of water, slashed with knives and emptied, conduct for which no Border Patrol agent was sanctioned.¹¹ CBP and BP misconduct is often more direct: since 2010, individuals have documented 77 CBP-related fatalities.¹² Information relating to potential CBP and BP misconduct is essential to validating public trust and opinion over the nation’s border immigration practices.

BORSTAR’s capacity and role as a “tactical medical, search and rescue,” unit merits particularly close scrutiny considering state, county, and local law enforcement agencies refer to Border Patrol “911” calls for emergency assistance. For instance, since 2007, Arizona’s Pima County began transferring its 911 calls from migrants directly to Border Patrol, instead of handling them in-house or transferring them to the county rescue services.¹³ Many other counties followed suit.¹⁴ According to many reports, this referral system has effectively transformed Border Patrol into the de facto emergency services provider in the greater-Tucson border area. The public has a right to understand the scope, nature, and parameters of this agreement, the right to assess the U.S. government’s capacity to serve as a de facto emergency service provider, and the right to analyze the efficacy with which it has done so.

B. Definitions

- 1) **Record(s).** In this request the term “Record(s)” includes, but is not limited to, all Records or communications preserved in electronic (including metadata) or written form, such as correspondences, emails, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, legal opinions, protocols, reports, rules, technical manuals, technical specifications, training manuals, studies, or any other Record of any kind.
- 2) **Agreements.** In this request the term “Agreement(s)” refers to any agreement, written or otherwise; communications; contracts and/or supplements, modifications or addendums to contracts or agreements.
- 3) **Communication(s).** In this request the term “communication” means the transmittal of information (in the forms of facts, ideas, inquiries or otherwise), including e-mails, texts

¹⁰ *Id.*

¹¹ Kathryn Hampton, MSt, *Zero Protection: How U.S. Border Enforcement Harms Migrant Safety and Health*, Physicians for Human Rights (Jan. 10, 2019), https://phr.org/resources/zero-protection-how-u-s-border-enforcement-harms-migrant-safety-and-health/#_ednref11

¹² John Burnett and Richard Gonzales, *Border Patrol Shooting Death of Immigrant Woman Raises Tensions in South Texas*, NPR Morning Edition, (May 24, 2018) <https://www.npr.org/sections/thetwo-way/2018/05/24/614268206/border-patrol-shooting-death-of-immigrant-woman-raises-tensions-in-south-texas>.

¹³ Puck Lo, *For migrants in Arizona who call 911, it’s Border Patrol on the line*, Al Jazeera (Mar. 25, 2018), <http://america.aljazeera.com/articles/2015/3/25/for-migrants-in-arizona-who-call-911-its-border-patrol-on-the-line.html>

¹⁴ *Id.*



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- or other electronic forms of recorded communication.
- 4) **Relating to.** The term “relating to” as used herein means addressing, constituting, mentioning, discussing, describing, reflecting, identifying, dealing with, consisting of, explaining, referring to, containing, enumerating, or in any way concerning or pertaining to, in whole or in part, directly or indirectly.
 - 5) **Local Law Enforcement Agency.** In this request the term “local law enforcement agency” includes state, county, municipal, and other law enforcement agencies within the Tucson Sector, including, but not limited to, the Pima County Sheriff’s Department and the Santa Cruz County Sheriff’s Office.
 - 6) **Land Management Agencies.** In this request the term “land management agencies” refers to federal agencies overseeing land jurisdictions within the Tucson Sector, including but not limited to the Organ Pipe Cactus National Monument and the Cabeza Prieta Wildlife Refuge.
 - 7) **Border Patrol.** The term “Border Patrol” as used herein refers to the U.S. Border Patrol and includes all offices, and all officers, staff, agents, consultants, appointees and employees thereof. Border Patrol is a component of CBP.
 - 8) **BORSTAR.** The term “BORSTAR” as used herein refers to Border Patrol’s Search, Trauma, and Rescue (“BORSTAR”) unit and includes all offices, and all officers, staff, agents, consultants, appointees and employees thereof.
 - 9) **JIOC.** The term “JIOC” refers to CBP’s Joint Intelligence Operations Center. JIOC serves as an emergency coordinator to assist 911 dispatchers from Pima, Maricopa, Pinal, Cochise and Santa Cruz counties. JIOC then facilitates a Customs and Border Protection response.
 - 10) **Tucson Sector.** The term “Tucson Sector” refers to the operative Border Patrol section spanning 262 miles of linear border running east from Yuma County, Arizona to the Arizona/New Mexico state line, comprised of eight stations: Why, Casa Grande, Tucson, Nogales, Willcox, Sonoita, Bisbee, and Douglas.
 - 11) **Search and Rescue.** The term “search and rescue” (sometimes referred to as “SAR”) in this request refers to any emergency action taken in response to an alert of a lost, missing, or distressed individual or individuals, including but not limited to all actions taken as a result of a 911 call received by Joint Intelligence Operations Center (sometimes referred to as “JIOC”) or any other search and rescue mission activated by BORSTAR.

C. Request for Information

We hereby request all records related to the Border Patrol’s practice of assisting migrants through search and rescue operations in the Tucson Sector carried out by BORSTAR, or by other Border Patrol personnel within the Tucson Sector, including but not limited to the following:

1. Records of any communications between JIOC, BORSTAR, and any other Border Patrol personnel, and local law enforcement agencies or land



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management agencies located in the Tucson Sector regarding BORSTAR and/or search and rescue operations from January 1, 2016, to present.

2. Data and statistics regarding aggregate number of requests for assistance from local law enforcement agencies or land management agencies located in the Tucson Sector personnel from January 1, 2016, to present, including:
 - i. Total number of requests received and processed by JIOC, and
 - ii. Amongst the requests received and processed by JIOC, the respective number of calls classified as:
 - search and rescues;
 - medical emergency;
 - improperly routed;
 - hoax;
 - give ups;
 - apprehensions;
 - any other category.
3. Data and statistics regarding each individual search and rescue operation conducted by BORSTAR agents or other Border Patrol personnel from January 1, 2016, to present, including:
 - i. Information relating to the search and rescue itself, including:
 - date;
 - time;
 - location.
 - ii. Information relating to individual or individuals for whom the search and rescue operation was initiated, including:
 - name;
 - age;
 - sex;
 - country of origin;
 - immigration status (if known).
 - iii. Information relating to the origin of the search and rescue operation, including:
 - referral by state, county, municipal, or other federal agency,
 - or whether initiated by Border Patrol itself.
 - iv. Outcome of search and rescue operation including
 - whether or not individual was located;
 - what actions were taken, if any;
 - what resources were used in the search including but not limited to helicopters, ground search teams, K-9 search teams, and cell-phone tracing technology;
 - if found, whether the individuals required and received medical care;
 - whether the individual survived.



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4. The most current procedures, protocols, standards, training materials, or other guidance relating on what basis JIOC classifies requests for emergency assistance, including but not limited to “search and rescue,” “medical emergency,” “improperly routed,” “hoax,” “give ups,” and “apprehensions.”
5. The most current procedures, protocols, standards, training materials, or other guidance for JIOC, BORSTAR, and any other Border Patrol personnel initiating, conducting, and recording a search and rescue operation within the Tucson Sector, including but not limited to missing persons situations.
6. The most current agreements, memoranda of understanding, or other records reflecting arrangements for cooperation or communication with local law enforcement agencies or land management agencies in Tucson Sector regarding the handling of 911 calls, BORSTAR and/or search and rescue operations, including but not limited to internal policies or procedures relating to whether and under what circumstances Border Patrol will initiate search and rescue operations when assistance is requested from local law enforcement agencies.

D. Format of Production

Please search for responsive records regardless of format, medium, or physical characteristics, and including electronic records. Please provide the requested documents in the following format:

- Saved on a CD, CD-ROM or DVD;
- In PDF or TIF format wherever possible;
- Electronically searchable wherever possible;
- Each paper record in a separately saved file;
- “Parent-child” relationships maintained, meaning that the requester must be able to identify the attachments with emails;
- Any data records in native format (i.e. Excel spreadsheets in Excel);
- Emails should include BCC and any other hidden fields;
- With any other metadata preserved.

E. The Requesters

The Center for Constitutional Rights (“CCR”) is a non-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR’s diverse dockets include litigation and advocacy around immigration detention, post-9/11 immigration enforcement policies, policing, and racial and ethnic profiling. CCR is a member of immigrant rights networks nationally and provides legal support to immigrant rights movements. One of CCR’s primary



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activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current immigration law issues, and other similar materials for public dissemination. These and other materials are available through CCR's Development, Communications, and Advocacy Departments. CCR operates a website, <http://ccrjustice.org>, which addresses the issues on which the Center works. The website includes material on topical civil and immigrant rights issues and material concerning CCR's work. All of this material is freely available to the public. In addition, CCR regularly issues press releases and sends regular updates to over 50,000 subscribers and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR staff members often serve as sources for journalist and media outlets, including on immigrant rights.

No More Deaths/No Mas Muertes

No More Deaths is a humanitarian-aid organization based in Southern Arizona. It formed in 2004 as a coalition of community and faith groups, dedicated to ending death and suffering in the U.S.–Mexico borderlands through civil initiative. As a humanitarian organization, it engages in a number of direct-aid projects in the border region: delivering water, food, and medical aid to those crossing through the most deadly areas of the Sonoran Desert; conducting community search and rescue for border crossers in distress; providing phone services to those who have been recently deported to Mexican border cities; offering a free immigration legal clinic in Tucson primarily to stop deportations; and more. One of the organization's key functions is reporting on and publishing key findings relating to its core work. Among many other publications including fact sheets, newsletters, mailing lists, and photographic and videographic reports, it released to the public three reports relating to abuses within the immigration system throughout the border region: *Crossing the Line* (2008), *A Culture of Cruelty* (2011), and *Shakedown* (2014). A fourth, *Disappeared*, is in progress and slated for release later this year. The organization continues to disseminate information relating to immigrants' rights and conditions at the border to the public, reaching a wide membership. All of this material is also freely available to the public on its website, <http://nomoredeaths.org>.

F. Fee Waiver

The Requesters are entitled to a fee waiver pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) and 6 C.F.R. § 5.11(k) on the grounds that "disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester[s]." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of institution). *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987). Requesters meet the requirements of 6 C.F.R. § 5.11(k) because the subject of the request concerns the operations or activities of the government; the disclosure of the information is likely to contribute to a significant public understanding of government operations or activities due to the requesters' expertise in the subject area and ability to convey the information; the Requesters' primary interest is in disclosure;



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and they have no commercial interest in the information. In addition, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), the Requesters qualify as a “representatives of the news media,” defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii).

NMD is an official ministry of the Unitarian Universalist Church of Tucson, a non-profit, tax-exempt organization. The mission of NMD is to stop the deaths of migrants in the desert and implement a set of faith-based principles for immigration reform. CCR is a non-profit organization dedicated to civil rights, human rights, and immigrant rights, and has a proven track-record of compiling and disseminating information and reports to the public about government functions and activities, including the government’s record and position on immigrants’ rights and human rights matters.

A. Release of the requested records is in the public interest.

Disclosure of the requested records is in the public interest because it will contribute significantly to public understanding of the government’s operations or activities. Requesters will also use the requested records to analyze the legality and safety of the practices used by Border Patrol agents. The Requesters will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost. Access to this information is crucial for the Requesters and the communities they serve to evaluate federal immigration action and their potential detrimental effects. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress’ legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers of noncommercial requesters.’”). The Request satisfies the four criteria set forth by DHS (at 6 C.F.R. § 5.11(k)(2)) for determining whether this requirement is met, as follows:

1. The request concerns the operations or activities of the federal government. The requested records pertain directly to the operations and activities of the federal government (specifically, CBP and one of its subcomponents, the U.S. Border Patrol).
2. The disclosure is “likely to contribute” to an understanding of federal government operations and activities. The requested records will help the public determine the extent to which Border Patrol uses certain practices that may affect the life and/or safety of individuals. This information is not currently available in the public domain.
3. The information will contribute to an “understanding of a reasonably broad audience of persons interested in the subject.” Among other things, NMD intends to publish responsive records and analyze specific documents to raise public awareness of Border Patrol’s operations and activities. NMD intends to publish this information to as broad an audience as possible. Moreover, NMD is experienced in the subject area, and has historically disseminated information on these topics to the public.



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4. The information will contribute significantly to public understanding of government operations or activities. Disclosure of the requested records will contribute “significantly” to the public’s understanding of the extent and implications of the federal government’s use of practices that may affect the lives and safety of migrants. This information is not currently available to the public through any source.

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

As described above, Requesters have no commercial interest in this matter and intend to use the requested records to benefit the general public by sharing the records publicly. Any information obtained as a result of this FOIA request will be made available to the public at no cost. The information requested will not be used by NMD to further any commercial interest. Requesters are not acting on behalf of any person whose commercial interest would be furthered by the requested information.

C. NMD qualify as representatives of the news media.

The Department of Homeland Security’s regulations implementing FOIA provide that “[n]o search fee will be charged for requests by . . . representatives of the news media.” 6 C.F.R. § 5.11(d)(1). Requesters meet the statutory and regulatory definitions of a “representative of the news media” because each of them is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also, e.g., National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); 6 C.F.R. § 5.11(b)(6) (“Representative of the news media or news media requester, means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”). NMD are both “representative[s] of the news media” for the same reasons that both are “primarily engaged in the dissemination of information.” *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 1, 10–15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for FOIA purposes); *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”).

For the foregoing reasons, a fee waiver or limitation should be granted. A fee waiver would also fulfill Congress’s legislative intent in amending FOIA, namely to ensure that the Act is liberally construed in favor of granting waivers for noncommercial requesters and to effectuate disclosure of documents of public importance. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.”) (internal quotation marks and citation omitted); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that “disclosure, not secrecy, is the dominant objective of the Act,”) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1992)).



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

G. Expedited Processing

The Requesters are entitled to expedited processing of this request because there is a “compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(i)(I). A “compelling need” is established when there exists an “urgency to inform the public concerning actual or alleged Federal Government activity,” when the requester is a “person primarily engaged in disseminating information,” 6 C.F.R. § 5.5(d)(ii).

Requesters seek Track 1 expedited processing for this FOIA Request, pursuant to 5 U.S.C. § 552(a)(6)(E)(i) (“Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—(I) in cases in which the person requesting the records demonstrates a compelling need. . . .”). Pursuant to DHS’s regulations implementing FOIA, a “compelling need” exists for expedited processing of a FOIA request when the request involves: (1) circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and (2) an urgency to inform the public about an actual or alleged federal government activity. 6 C.F.R. § 5.5(d)(1)(i)–(ii). This Request meets both circumstances.

First, a “compelling need” exists when “a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” 5 U.S.C. § 552(a)(6)(E)(v)(I); *see also* 6 C.F.R. § 5.5(d)(1)(i) (requests are to be given expedited treatment whenever they involve “[c]ircumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual”). The requested records relate to actions of the CBP and Border Patrol Tucson Sector such as responding to migrants’ distress calls, dealing with life-saving aid supplies, and encountering groups of migrants in the desert. If not undertaken appropriately, these practices can pose an imminent threat to the life and physical safety of individuals. Requesters believe that expedited disclosure of these records will facilitate an expedited inquiry into the appropriateness of these actions. Moreover, expedited disclosure of these records will provide migrant aid groups such as NMD with information regarding the location and extent of these practices, allowing these groups to provide more appropriate and timely aid to those potentially impacted by these practices in the future. There is thus a “compelling need” for the requested records.

A compelling need can also be demonstrated “with respect to a request made by a person primarily engaged in disseminating information,” when the request involves an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. §



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552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5 (d)(1)(ii).

NMD qualifies as an organization “primarily engaged in disseminating information” for the following reasons. Dissemination of information to the public about “actual or alleged government activity” is a critical and substantial component of NMD’s mission and work. For example, NMD has recently published two major reports: “Deadly Apprehension Methods: The Consequences of Chase & Scatter in the Wilderness” (2016) and “Interference with Humanitarian Aid: Death & Disappearance on the US-Mexico Border” (2018). These documents have been widely disseminated both at a national and international level. NMD volunteers have presented their findings from previous reports before Congress and in other national forums. Further, NMD’s work has been covered by national media including the New York Times,¹⁵ the Washington Post,¹⁶ and the Los Angeles Times.¹⁷ Depending on the results of this Request, NMD plans to disseminate the information they receive to the public using similar kinds of publications and distribution channels. NMD are therefore organizations “primarily engaged in disseminating information” within the meaning of the statute and the relevant regulations.

Furthermore, an “imminent threat to the life or physical safety of an individual” exists. NMD is uniquely positioned as a humanitarian assistance organization, providing aid to potentially thousands of individuals traversing the perilous terrain in and around the U.S.-Mexico border. Documents obtained in the FOIA would provide vital information regarding BORSTAR’s increasing role as the de facto emergency services provider for these individuals stranded in life-or-death situations. Recent reports referenced *supra* indicate that an increasing number of individuals are seeking asylum in between ports of entry due to the U.S.’s “metering” policy, a circumstance further concretizing this conclusion that these documents are urgently needed to prevent imminent death.

In addition, DHS grants expedited processing where the subject of the request is a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 6 C.F.R. § 5.5(e)(1)(iv). As described in the sections above, the ongoing migration crisis and, particularly, the U.S. government’s inability to respond humanely, has garnered “widespread and exceptional media interest.”¹⁸ The

¹⁵ Justine Orlovsky-Schnitzler, *The Desert Should Not Be a Death Sentence*, New York Times (Dec. 18, 2018) <https://www.nytimes.com/2018/12/18/opinion/migrants-border-death.html>

¹⁶ Teresa Tomassoni, *Activists making ‘water drops’ for migrants near border say government intimidation is rising*, Washington Post (Jan. 29, 2019), https://www.washingtonpost.com/national/activists-making-water-drops-for-migrants-near-southern-border-say-government-intimidation-is-rising/2019/01/29/1f832464-1f52-11e9-8b59-0a28f2191131_story.html?utm_term=.35e0000a52c8

¹⁷ Molly Hennessy-Fiske, *Should activists aid migrants in the desert, or leave their fate to the Border Patrol?*, Los Angeles Times (Mar. 8, 2019), <https://www.latimes.com/nation/la-na-arizona-migrant-rescue-trial-20190308-story.html>

¹⁸ See, e.g., Anne Flaherty, *More than 260 migrants died trying to cross the US southern border: Report*, ABC News (Dec 14, 2018), <https://abcnews.go.com/International/260-migrants-died-cross-us-southern-border-report/story?id=59832675>; Nick Miroff and Robert Moore, *7-year-old migrant girl taken into Border Patrol custody dies of dehydration, exhaustion*, Washington Post (Dec. 13, 2018), <https://www.washingtonpost.com/world/national->



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government's well-documented¹⁹ hostility towards immigrants at the southern border calls into question the government's ability to handle the crisis such that it affects public confidence.

Conclusion and Certification

For all of the foregoing reasons, expedited processing of this Request is warranted and should be granted. In accordance with the requirements of FOIA and DHS's applicable regulations implementing FOIA, Requesters hereby certify that the foregoing is true and correct to the best of their knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3).

We look forward to your response regarding our request for expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4). By codifying the presumption of openness through the FOIA Improvement Act of 2016, Congress has "put[] the force of law behind the notion that sunshine, not secrecy, is the default setting of our government." *See* Con. Rec. S3825 (daily ed. June 13, 2016 (statement of Sen. Leahy)).

If this Request is denied in whole or in part, the Requesters ask that the DHS and CBP justify all deletions by reference to specific exemptions of FOIA. The Requesters expects DHS and CBP to release all segregable portions of otherwise exempt material, and reserves the right to appeal a decision to withhold any records or to deny the within application for expedited processing and waiver of fees.

Please furnish all responsive records electronically to:

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Center for Constitutional Rights
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security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199_story.html?utm_term=.fbc64fcc0dd

¹⁹ *See, e.g.,* Michelle Chen, *There Are Still Migrant Children Separated From Their Families*, *The Nation* (Jan. 30, 2019) <https://www.thenation.com/article/family-separation-border-central-american-immigration-crisis/>; Tim Elfrink and Fred Barbash, *These children are barefoot. In diapers. Choking on tear gas.*, *Washington Post* (Nov. 26, 2018), https://www.washingtonpost.com/nation/2018/11/26/these-children-are-barefoot-diapers-choking-tear-gas/?utm_term=.42b788b65b0a.