

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NEW HAMPSHIRE

Plaintiff,

v.

UNITED STATES CUSTOMS AND  
BORDER PROTECTION

Defendant.

Case No.: 1:19-cv-00977-LM

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552 et seq.**

**INTRODUCTION**

The American Civil Liberties Union Foundation of New Hampshire (“Plaintiff” or “ACLU-NH”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended, to obtain injunctive and other appropriate relief requiring the United States Customs and Border Protection (“CBP” or “Defendant”) to respond to two FOIA requests sent by ACLU-NH on March 25, 2019 (“3/25/19 Request”) and October 17, 2019 (“10/17/19 Request”) (collectively “Requests”), and to promptly disclose the requested records.

The Requests seek records concerning CBP’s local immigration enforcement (patrol operations) in New Hampshire. *See Exhibits A (3/25/19 Request) and B (10/17/19 Request)*. There is a significant public interest in these records, especially in light of CBP’s aggressive enforcement actions far from the Canadian border. Disclosure of the requested records would facilitate the public’s understanding of how CBP enforces the immigration laws in New

Hampshire. Such information is critical to the public's ability to hold the government accountable.

The requested records contain information of great public importance. For example, CBP recently conducted multiple patrols and raids in Lebanon area (nearly 100 miles from the Canadian border), which led detention of many noncitizens.<sup>1</sup> **Exhibit C (Jose)**. In March 2019, CBP followed and detained a noncitizen in Lebanon, New Hampshire. **Exhibit D (Information on Florentin Avila Lucas)**.<sup>2</sup> In April 2019, CBP officers in plainclothes and an unmarked vehicle detained an immigrant.<sup>3</sup> Further, a state court decision also found violations of the federal and state constitutions based in part on collaboration between CBP and local law enforcement. *See New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (Second Circuit District Division Plymouth, Grafton, May 1, 2018).<sup>4</sup>

These are precisely the types of information covered by ACLU-NH's FOIA requests. The public has a right to know about CBP's patrol operations, notably when such operations involve with agents in plainclothes and unmarked vehicles. Further, as the attached exhibits show, CBP's patrol operations and manner of seizure may be questionable. *See, e.g., Exhibits C and D*.

This action is necessary because, months after receiving the Requests, CBP has still failed to provide timely determinations as required by statute, and have otherwise failed to respond to the Request adequately.

ACLU-NH further alleges as follows:

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<sup>1</sup> *See* Jordan Cuddemi, *Border Patrol Agents Apprehend 18 People in Lebanon Area*, Valley News (Aug. 14, 2019), available at <https://www.vnews.com/Border-patrol-agents-apprehend-18-people-in-Upper-Valley-27701561>.

<sup>2</sup> This document was filed in *Brito, et al v. Barr, et al.*, No. 1:19-cv-11314-PBS (D.Mass. June 13, 2019).

<sup>3</sup> *See* Paul Hayes, *Border Patrol Agents Detain Franconia Chef*, Caledonian Record (Apr. 17, 2019), available at [https://www.caledonianrecord.com/news/border-patrol-agents-detain-franconia-chef/article\\_2a65ec35-293c-5552-b301-3aa98af56751.html](https://www.caledonianrecord.com/news/border-patrol-agents-detain-franconia-chef/article_2a65ec35-293c-5552-b301-3aa98af56751.html).

<sup>4</sup> Available at [https://www.aclu-nh.org/sites/default/files/field\\_documents/state\\_v.\\_mccarthy\\_-\\_order\\_5-1-18.pdf](https://www.aclu-nh.org/sites/default/files/field_documents/state_v._mccarthy_-_order_5-1-18.pdf).

### **JURISDICTION AND VENUE**

1. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331.

2. The venue is proper in the District of New Hampshire under 5 U.S.C. § 552(a)(4)(B) because ACLU-NH's principal place of business is the District of New Hampshire and because a substantial portion of the requested records related to immigration enforcement and communications occurs in the District of New Hampshire. For the same reasons, the venue is also proper under 28 U.S.C. § 1391(e).

### **PARTIES**

3. Plaintiff American Civil Liberties Union Foundation of New Hampshire ("ACLU-NH") is a non-profit 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates that public about civil rights and civil liberty issues across New Hampshire. ACLU-NH is headquartered in Concord, New Hampshire.

4. Defendant U.S. Customs and Border Protection ("CBP") is a federal agency within the meaning of 5 U.S.C. § 552(f)(1).

5. Plaintiff is informed and believes that CBP has possession, custody, or control of the requested records.

### **FACTS**

#### **Public Concern with CBP's Immigration Enforcement**

6. The Requests arise from widespread public interest in immigration enforcement in New Hampshire after CBP's aggressive patrol operations began occurring in places almost 100 miles from the Canadian border. In recent years, ACLU-NH has seen unprecedented, and often

unlawful, immigration enforcement in New Hampshire. These trends are particularly concerning given the ongoing and grave concerns with the lack of transparency and oversight in CBP's enforcement practices.<sup>5</sup>

7. This increased enforcement has included the use of CBP checkpoints on at least eight (8) occasions deep in the interior of New Hampshire. On two separate occasions in August and September 2017, CBP instituted temporary immigration checkpoints on Interstate 93 (South) in Woodstock, New Hampshire. Woodstock is a small town (population 1,374) located in the White Mountains – a popular tourist attraction – that is approximately 90 driving miles from the Canadian border. Subsequently, CBP conducted 5 checkpoints at this Woodstock location in 2018 (May 26-28, June 15-17, August 21-23, and September 27) and 2019 (June 9).<sup>6</sup> CBP also set up a checkpoint on Interstate 89 in Lebanon, near Dartmouth College on September 5, 2019—a location nearly 100 miles from the Canadian border.<sup>7</sup>

8. In addition to checkpoints, CBP started to conduct patrol operations in New Hampshire to question, stop, and detain individuals.

9. In March 2019, CBP conducted a patrol operation in Lebanon, New Hampshire, nearly 100 miles from the Canadian border. **Exhibit D.** Florentin Avila Lucas planned to take his friend out for lunch for his birthday. *See id.* He and his friends stopped at a thrift store so that his friend could buy some new work clothes. *See id.* Two plainclothes Border Patrol agents in an

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<sup>5</sup> *See, e.g.,* James Lyall et al., *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations*, ACLU of Arizona (Oct. 2015), available at [https://www.acluaz.org/sites/default/files/documents/Record\\_of\\_Abuse\\_101515\\_0.pdf](https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf).

<sup>6</sup> *See* Jake Sheridan, *Border Patrol Mum on Future of Checkpoints in New Hampshire This Summer*, Concord Monitor (June 21, 2019), available at <https://www.concordmonitor.com/Live-Free-or-die---and-get-stopped-at-a-checkpoint-26413667>.

<sup>7</sup> *See id.*; *see also* Kyle Mullins and Mary Winters, *Immigration Checkpoint Near Dartmouth Sparks Concerns From Community*, available at <https://www.thedartmouth.com/article/2019/09/immigration-checkpoint-near-dartmouth-sparks-concerns-from-community>.

unmarked vehicle trailed his vehicle and followed them into the store. *See id.* While Mr. Avila Lucas was in the store, one of the Border Patrol agents approached him and asked him to step out to the parking lot. *See id.* In the parking lot, the agent asked Mr. Avila Lucas several questions. *See id.* The agent then grabbed Mr. Avila Lucas, pushed him to the ground, handcuffed him, and took him into custody. *See id.*

10. In April 2019, CBP conducted another patrol operation that led to the apprehension of Chef Juan Pu.<sup>8</sup> Chef Juan Pu and his family were eating lunch in Littleton, New Hampshire.<sup>9</sup> In the parking lot, two CBP agents who were not in uniform got out of an unmarked vehicle and put Chef Pu into the vehicle in front of his wife and children.<sup>10</sup> According to CBP, they were patrolling the Littleton area, nearly 65 driving miles from the Canadian border.<sup>11</sup>

11. Between July 29 and August 1, 2019, CBP conducted several patrols that resulted in the apprehension of 18 undocumented immigrants.<sup>12</sup> One of the apprehended immigrants was Jose. **Exhibit C.** On July 31, 2019, CBP agents in unmarked vehicles and plain civilian attire with no badges or weapons visible surveilled a car near West Lebanon, New Hampshire. *Id.* CBP stopped the vehicle and inquired the immigration status of Jose. *Id.* Subsequently, CBP detained him. *Id.*

12. Between August 7 and 9, 2019, CBP detained nine additional undocumented immigrants through their patrol operations.<sup>13</sup>

13. Despite this increased enforcement, there is little publicly-available information

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<sup>8</sup> *See supra* fn. 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See supra* fn. 1.

<sup>13</sup> *Id.*

regarding the extent or impact of CBP roving patrol operations, or regarding Border Patrol agents' respect for the regulatory limitations on their authority. For decades, federal judges have expressed concern that such interior operations result in widespread rights violations.<sup>14</sup>

### **Plaintiff's FOIA Request**

14. On March 25, 2019 and October 17, 2019, ACLU-NH submitted the Requests through the U.S. government's FOIA online website.<sup>15</sup> *See* 6 C.F.R. § 5.3 (stating that all DHS components "have the capability to receive requests electronically, either through email or a web portal"). **Exhibits A and B.**

15. The Requests seek all records and communications relating to CBP's non-checkpoint patrol operations in New Hampshire from January 1, 2017, until the date when CBP completes an adequate search for responsive records. *Id.* Because no adequate search has yet been completed, the period covered by the Request is ongoing.

16. Specifically, the 3/25/19 Request seeks "records about U.S. Customs and Border Protection ("CBP") non-checkpoint patrol operations conducted in New Hampshire to surveil and arrest undocumented and documented immigrants," including:

- (1) Record containing descriptions of CBP non-checkpoint patrol operations in the States of New Hampshire, including the dates, times, and exact locations at which CBP agents were deployed; and the number, titles, and job ranks of CBP officers involved on each date and at each location;

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<sup>14</sup> *See, e.g., United States v. Garcia*, 732 F.3d 1221, 1229 (5th Cir. 1984) (Tate, J., dissenting) ("Quite unfortunately, we have the opportunity only to review the successful guesses of these agents; we are never presented with the unconstitutionally intrusive stops of Hispanic residents and citizens that do not result in an arrest. Differentiating the United States from police states of past history and the present, our Constitution in its Fourth Amendment prohibition against unreasonable searches protects all our residents, whether middle-class and well-dressed or poor and disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the highways of this nation.").

<sup>15</sup> <https://foiaonline.gov/foiaonline/action/public/home>.

- (2) Records from CBP or other federal agencies authorizing the non-checkpoint patrol operations in any cities or towns including but not limited to Manchester or West Lebanon in the States of New Hampshire, or addressing the legality of stops, patrols, questioning, seizures, or searches conducted by CBP;
- (3) Records of New Hampshire or local law enforcement agency involvement with CBP, including, but not limited to, participating in any surveillance and apprehension of undocumented/documentated immigrants;
- (4) Records sent by CBP to any federal, state, or local government agencies, including but not limited to U.S. Immigration and Customs Enforcement, the Federal Bureau of Investigation, U.S. Department of Homeland Security, New Hampshire Police, and local law enforcement agencies in New Hampshire, relating to the purpose, methods, conduct, or results from the citizenship inquiries;
- (5) With regard to persons subjected to any citizenship inquiry, records showing: a) the total number of people questioned; b) the country of origin of people questioned; c) the race and/or ethnicity of people questioned; d) the race and/or ethnicity of people questioned; e) the location and duration of the person's detention, if applicable; f) the date of the person's voluntary departure from the United States, if applicable; g) the date of the person's removal from the United States, if applicable.

**Exhibit A.**

17. Further, the 10/17/19 Request seeks the records regarding:
  - (1) Internal memoranda, legal opinion, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to roving patrol operations generally;
  - (2) Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to all searches and seizures (including arrests) made pursuant to roving patrol operations;
  - (3) Audits, reports, statistical data and analysis, quotas, targets, goals, and performance standards, measures, or reviews, and all documents related to any incentives or bonus programs relating to roving patrol operations by the Swanton Sector;

- (4) Organizational charts, diagrams, or schematics pertaining to roving patrol operations in the Swanton Sector, including charts reflecting agency leadership structures or individuals involved in decisionmaking related to roving patrol operations;
- (5) Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures or other records pertaining to CBP's authority to conduct roving patrol stops based on alleged or actual violations of local or state law, including traffic laws, in the Swanton Sector;
- (6) Records regarding any individual questioned, stopped, searched, detained, and / or arrested in roving patrol operations in New Hampshire by CBP (Swanton Sector or others if they conducted roving patrol operations in New Hampshire), including but not limited to:
  - a. Field Contact Data Sheets;
  - b. Forms I-247 (DHS "Immigration Detainer – Notice of Action");
  - c. Forms I-213 ("Record of Deportable/Inadmissible Alien");
  - d. Forms I-44 ("Report of Apprehension or Seizure");
  - e. Forms I-862 ("Notice to Appear");
  - f. Forms I-826 ("Notice of Rights and Request for Disposition"); and
  - g. Forms I-871 ("Notice of Intent/Decision to Reinstate Prior Order")
- (7) Records relating to and / or containing information sufficient to show (since January 1, 2017):
  - a. The total number of roving patrol stops made by CBP in New Hampshire;
  - b. The total number of roving patrol stops resulting in searches;
  - c. The total number of roving patrol stops resulting in arrest, as well as the disposition of each such arrest (e.g., Notice to Appear; criminal reentry charges and resolution thereof, etc.);
  - d. The citizenship of each individual stopped in the course of roving patrols;
  - e. The citizenship of each individual searched in the course of roving patrols;
  - f. The citizenship of each individual arrested in the course of roving patrols;
  - g. The apparent race or ethnicity of each individual stopped in the course of roving patrols;
  - h. The apparent race or ethnicity of each individual searched in the course of roving patrols;
  - i. The apparent race or ethnicity of each individual arrested in the course of a roving patrol;

- j. The location of each roving patrol stop;<sup>16</sup>
- k. The location of each roving patrol stop resulting in a search;
- l. The location of each roving patrol stop resulting in any arrest;
- m. The type of each roving patrol stop (e.g., entry onto private land, pedestrian encounter, or vehicle stop);
- n. The type of each roving patrol stop resulting in a search (e.g., entry onto private land, pedestrian encounter, or vehicle stop);
- o. The type of each roving patrol stop resulting in arrest (e.g., entry onto private land, pedestrian encounter, or vehicle stop);
- p. The date of each roving patrol stop;
- q. The date of each roving patrol stop resulting in a search;
- r. The date of each roving patrol stop resulting in any arrest;
- s. The number of agents involved in each roving patrol stop;
- t. The number of agents involved in any search in the course of a roving patrol, and whether a search involved one or more canines;
- u. The number of agents involved in any arrest in the course of a roving patrol;
- v. The basis for all stops resulting in arrest, including stops initiated by any state or local law enforcement agency;
- w. The basis for all stops not resulting in arrest, including stops initiated by any state or local law enforcement agency;
- x. The CBP agent(s)/officer(s) involved in determining whether reasonable suspicion or probable cause existed to justify each stop, and whether the reviewing agent(s)/officer(s) was or were the same as the agent(s)/officer(s) who initiated the stop under review;
- y. The date, time, and location of any roving patrol that was the subject of any complaint, internal or external investigation and the status and/or outcome of any such complaint or investigation.

- (8) All disciplinary records resulting from any alleged agent/officer misconduct or alleged violation of CBP and / or DHS rules or regulations related to roving patrol operations in the Swanton Sector.

**Exhibit B.**

18. The Requests include applications for expedited processing, on the grounds that there is a “compelling need” for the requested records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because of the urgency to inform the public concerning actual or alleged Federal Government activity.

**Exhibits A and B.** As set forth above, there is an urgent need for public transparency and

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<sup>16</sup> To the extent materials exist that document such information in various formats (e.g., databases or other compilations of information based on, for example, city, county, sector, and/or zip code), such materials are included in this 10/17/19 Request.

information about how CBP is carrying out its activities in New Hampshire.

19. Furthermore, the Requests detail that ACLU-NH is primarily engaged in disseminating information within the meaning of 5 U.S.C. § 552(a)(6)(E)(v), given that a critical and substantial aspect of ACLU-NH's mission is to obtain information about government activity, analyze that information, and public and disseminate that information widely to the press and public. **Exhibits A and B.**

20. As explained in the Requests, examples of ACLU-NH's information-dissemination function include publishing blogs, newsletters, "Know Your Rights" documents, and other educational and informational materials. **Exhibits A and B.**

21. The Requests also include applications for a fee waiver or limitation under 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records is in the public interest and 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." In particular, ACLU-NH emphasized that the Requests would significantly contribute to public understanding on a matter of profound public importance about which scant specific information had been made public, *i.e.*, CBP's local enforcement of the immigration laws as part of their patrol operations conducted almost 100 miles from the Canadian border in New Hampshire. The Requests also made clear that ACLU-NH plans to disseminate the information disclosed as a result of the Request to the public at no cost. **Exhibit A and B.**

22. The Requests also applied for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that ACLU-NH qualifies as "representative of the news media" and the records are not sought for commercial use, given ACLU-NH's non-profit mission and substantial activities to publish information for dissemination to the public. **Exhibits A and B.**

### Agency's Response

23. For the 3/25/19 request, on March 26, 2019, CBP sent an electronic letter acknowledging receipt of the Request, but without mentioning any “determination” whether to comply with the Request. **Exhibit E.** Rather, the letter simply states that ACLU-NH should submit its FOIA request to CBP electronically, notwithstanding that ACLU-NH had already submitted the FOIA request through “FOIAonline.” *See Exhibit A.*

24. On May 3, 2019, CBP fully granted the request for expedited treatment and for a fee waiver. **Exhibits F and G.**

25. On December 4, 2019, CBP produced its response. *See Exhibit H.* CBP has produced “17,930 pages of records for this request. 17,842 pages of records are partially redacted” and “additional 88 pages of records are being withheld full.” *Id.*

26. However, no explanation has been provided with respect to the scope and method of its search in detail.<sup>17</sup>

27. For the 10/17/19 request, on October 20, 2019, CBP sent an electronic letter acknowledging receipt of the Request, but without mentioning any “determination” whether to comply with the Request. **Exhibit I.** Rather, the letter simply states that “goal is to respond within 20 business days of receipt of your request, [but] 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).” *See id.*

28. On the same date, CBP fully granted the request for expedited treatment and for a fee waiver. **Exhibits J.** However, CBP failed to state whether or by when it would respond to the Request. *Id.* The correspondence from October 20, 2019, was CBP's last response to the Request.

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<sup>17</sup> ACLU-NH will address the inadequate search issue along with other withholding / production related objections after CBP produces or provides additional records or responses to the Requests and/or this amended complaint.

**Exhibit K.**

29. ACLU-NH is deemed to have exhausted its administrative remedies with respect to CBP under 5 U.S.C. § 552(a)(6)(C), because CBP failed to provide a response to the Request within the 20-business-day time limit required by statute under 5 U.S.C. § 552(a)(6)(A)(i).

**Ongoing Public Interest in Local Immigration Enforcement**

30. Since the Requests were filed on March and October 2019, there continues to be a strong public interest in the requested records regarding local immigration enforcement.

31. For instance, there was a public outcry on August 14, 2019, over CBP's aggressive patrol operations that resulted in the apprehension of 27 undocumented immigrants in Lebanon and Littleton areas.<sup>18</sup> *See Exhibit C.*

32. Upon information and belief, CBP also targeted and arrested people near Manchester, New Hampshire because it has a sub-station in Manchester, New Hampshire. *See Exhibit C* at 4 (“All subject were transported to the Beecher Falls Border Patrol’s Sub-station in Manchester, NH for further processing”). Manchester is over 150 miles from the Canadian border.

33. In a nutshell, all available information paints a concerning picture of CBP's local immigration patrol operations in New Hampshire, notably almost 100 miles from the border. The public has the right to know the true scope of these operations.

**CLAIMS FOR RELIEF**

**COUNT I  
VIOLATION OF FOIA FOR FAILURE  
TO PROMPTLY MAKE AVAILABLE THE REQUESTED RECORDS**

34. All prior paragraphs are incorporated.

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<sup>18</sup> *See supra* fn. 1, available at <https://www.vnews.com/Border-patrol-agents-apprehend-18-people-in-Upper-Valley-27701561>.

35. CBP's failure to promptly make available the requested records violates FOIA, 5 U.S.C. § 552(a)(6)(A).

**COUNT II**  
**VIOLATION OF FOIA FOR FAILURE**  
**TO MAKE A REASONABLE EFFORT TO SEARCH FOR THE REQUESTED**  
**RECORDS**

36. All prior paragraphs are incorporated.

37. CBP's failure to make a reasonable effort to search for the requested records violates FOIA, 5 U.S.C. § 552(a)(3).

**RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Assume jurisdiction over this matter;
- B. Declare that Defendant's failure to timely respond to Plaintiff's FOIA Request; to conduct a reasonable search; and/or to disclose the requested records is unlawful;
- C. Issue an injunction ordering Defendant to immediately disclose the requested records and to make copies immediately available to Plaintiff without charge for any search or duplication fees;
- D. Award reasonable costs and attorney's fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

By and through his attorneys affiliated with the  
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/s/ SangYeob Kim

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