



December 6, 2019

SENT VIA CERTIFIED MAIL

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229

SENT VIA EMAIL

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**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

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DAVID C. FATHI
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*NOT ADMITTED IN DC:
PRACTICE LIMITED TO
FEDERAL COURTS

**Re: FOIA Request Related to CBP Treatment of Pregnant
Individuals and Provision of Reproductive Health Care**

Dear Freedom of Information Officer:

The American Civil Liberties Union (“ACLU”) submits this Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, request for production of records (the “Request”). The ACLU also seeks a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A) and 6 C.F.R. § 5.11(k), and expedited processing, pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e). The justification for the fee waiver and expedited processing are set out in detail following the Request.

Request for Information

The ACLU seeks any and all records that were prepared, received, transmitted, collected, and/or maintained by the U.S. Customs and Border Protection (“CBP”) that describe, refer, or relate to the policies, guidelines,

protocols, procedures, or practices followed or used by CBP regarding the identification of and care provided to pregnant individuals apprehended by CBP, in CBP custody, or subject to the Migrant Protection Protocol (“MPP”). Unless otherwise noted, we request the records specified below from January 20, 2017 to the present.

For purposes of this request, the term “records” includes but is not limited to any and all communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, spreadsheets, charts, rules, manuals, technical specifications, training materials, and studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

For purposes of this request, the term “DHS” means Department of Homeland Security, and any components, subcomponents, offices, or personnel therein.

For purposes of this request, the term “CBP” means Customs and Border Protection, and any components, subcomponents, offices, or personnel therein.

For purposes of this request, the term “MPP” refers to the Migrant Protection Protocols, a U.S. government program where certain foreign individuals entering or seeking admission to the U.S. from Mexico are returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings.¹

For purposes of this request, the term “TEDS” means the National Standards on Transport, Escort, Detention, and Search, issued by U.S. Customs and Border Protection in October 2015.²

Specific records requested:

1. Any and all records related to the identification, classification, treatment, and care of pregnant persons apprehended by CBP, subject to secondary screening, extended questioning, an enforcement examination, or detention by CBP, or in CBP custody,

¹ For ease of reference, please see Migrant Protection Protocols, U.S. Homeland Security, Jan. 24, 2019, available at <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; *see also* MPP Guiding Principles, U.S. Customs and Border Protection, Jan. 28, 2019, available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

² For ease of reference, please see U.S. Customs and Border Protection, National Standards on Transport (2015), <https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search>.

including, but not limited to TEDS Sections 3.9, 4.2, 5.1, 5.5, 5.6, and 5.7.

2. Any and all records related to the identification, classification, treatment, and care of survivors or victims of sexual assault apprehended by CBP, subject to secondary screening, extended questioning, an enforcement examination, or detention by CBP, or in CBP custody.
3. Any and all records related to the use of restraints on pregnant people, or people in active labor, delivery, or post-delivery recuperation in CBP custody.
4. Any and all records related to the custody, classification, treatment, or care of pregnant people or people in active labor under or subject to the Migrant Protection Protocols.
5. Any and all records, including, but not limited to, any databases, spreadsheets, lists, and other data compilations, that reflect the following:
 - a. The total number of individuals in CBP custody identified as pregnant while in CBP custody, including any lists broken down by month and/or facility at which the individual was housed.
 - b. The total number of individuals in CBP custody who gave birth while in CBP custody, including any lists broken down by month and/or facility at which the individual was housed.
 - c. The total number of individuals in CBP custody who had a miscarriage while in CBP custody, including any lists broken down by month and/or facility at which the individual was housed.
 - d. The total number of individuals in CBP custody who terminated a pregnancy while in CBP custody, including any lists broken down by month and/or facility at which the individual was housed.
 - e. The total number of pregnant individuals apprehended by CBP, including any lists broken down by month and/or location of the apprehension.
 - f. The total number of pregnant individuals under or subject to the Migrant Protection Protocols.

6. Any and all records, including significant incident reports (SIRs) and associated documentation, regarding the identification, care, and treatment of individuals who are pregnant, postpartum, who recently had a miscarriage or who recently had a terminated pregnancy in CBP custody.
7. Any and all records, including significant incident reports (SIRs) and associated documentation, regarding the identification, care, and treatment of individuals who are pregnant, postpartum, who recently had a miscarriage or who recently had a terminated pregnancy and who are subject to MPP.
8. Any and all records documenting the use of restraints on pregnant people, people in active labor, delivery, or post-delivery recuperation in CBP custody.
9. Any and all records regarding the request or provision of preventative contraception, emergency contraception, or abortions to people in CBP custody.
10. All press releases, statements, post-investigation reports, summaries, or records of communication within federal agencies or federal agencies and local agencies or federal agencies and Mexican government officials containing, describing, referring to, or revealing information related to pregnant people, or people in active labor, delivery, or post-delivery recuperation in CBP custody or subject to the MPP.
11. Any and all records related to an investigation of the treatment of pregnant people, or people in active labor, delivery, or post-delivery recuperation in CBP custody or subject to the MPP by the DHS Office of Inspector General, the DHS Office for Civil Rights and Civil Liberties, or the CBP Office of Professional Responsibility.

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this FOIA Request should also be considered within the Request's scope.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible, with all metadata and load files. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. However, to the extent that a response to this request would require you to provide multiple copies of identical material, the

request is limited so that only one copy of the identical material is requested. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. Please do not compress images or downsample the resolution, as this interferes with their legibility. To facilitate a speedy response, we ask that records responsive to this request be produced on a rolling basis. The ACLU will accept records and other information that have been redacted pursuant to the Health Insurance and Portability Accountability Act³ or other statutes or regulations protecting the privacy of individual detainees.

In the event you determine that materials contain information that falls within the statutory exemptions to mandatory disclosure, we request that such information be reviewed for possible discretionary disclosure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). We also request that, in accordance with 5 U.S.C. § 552(b), any and all reasonably segregable portions of otherwise exempt materials be produced. To the extent the request is denied, we expect to receive notice in writing, including a description of the information withheld, the reasons for denial, and any exemptions relied upon.

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Fee Waiver Request

The ACLU requests that any fees associated responding to its FOIA request be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k). Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), fees should be waived or reduced if disclosure is (1) in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interest of the requester.” Disclosure in this case meets both of these tests. The ACLU also requests a waiver or reduction of fees on the grounds that the ACLU qualifies as a “representative[] of the news media” and the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

1. *Disclosure is in the public interest as it is likely to contribute significantly to the public’s understanding of the operations and activities of government.*

First, disclosure pursuant to this Request is in the public interest. The treatment of pregnant individuals by CBP is of great concern to the public. Public reports indicate that immigrants held at CBP detention facilities are subject to severe overcrowding, lack of medical and mental health care, and poor conditions.⁴

³ 42 U.S.C. § 1320d-6.

⁴ *See, e.g.* OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC’Y, DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY, OIG-19-51 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19.pdf>; Gaby Del Valle, *Flu, Lice, and Open Toilets: What Attorneys Saw at Migrant Child Processing Centers*, VICE, June 22, 2019,

More asylum-seekers than ever are women and families.⁵ Between 2018 and 2019 alone, at least seven children died while in CBP custody.⁶

CBP officials have reportedly shackled pregnant asylum seekers around their hands, legs, and bellies and denied them medical care; several pregnant individuals have suffered miscarriages in CBP custody.⁷ In recent months, CBP has encountered dozens of pregnant asylum seekers at the U.S.-Mexico border who have been subject to inadequate access to medical and mental health care, inadequate access to food and water, and unsafe living conditions.⁸ In June 2019, news reports revealed that a pregnant woman apprehended by Border Patrol agents in McAllen, Texas delivered a stillborn baby.⁹ In September 2019, CBP agents took measures to stop contractions of a pregnant asylum seeker in labor, and forced her away from the United States to return to Mexico, citing the MPP policy.¹⁰

CBP's treatment of pregnant women has raised specific concern by the American Medical Association, which has noted that conditions in CBP custody "are inconsistent with evidence-based recommendations for appropriate care and treatment of children and pregnant women."¹¹ Placing pregnant women in shackles or restraints can have serious health consequences, as outlined by the American College of Obstetricians and Gynecologists.¹²

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https://www.vice.com/en_us/article/43jppj/flu-lice-and-open-toilets-what-attorneys-saw-at-migrant-child-processing-centers; Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, NY TIMES, July 2, 2019,

<https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html>; Nick Valencia & Catherine E. Shoichet, *Lack of Soap, Filthy Onesies and Too Few Beds Have Created a 'Health Crisis' at Border Detention Facilities, Monitors Warn*, CNN.com, June 21, 2019.

<https://www.cnn.com/2019/06/20/politics/border-detention-facilities-health/index.html>.

⁵ LUTHERAN IMMIGRATION AND REFUGEE SERVS. ET AL., *BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES* (2017).

⁶ Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC NEWS, May 29, 2019, <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316?fbclid=IwAR38n79Vu1jBLEjqEPL8NCeCJ7qaGinN2TJOUtTfEkVI1BKJDyISX3Jee7Rs>.

⁷ Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS, July 9, 2018,

<https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

⁸ Complaint from ACLU to DHS Office of Inspector General, *Pregnant Women Returned to Mexico under the Migrant Protection Protocols (MPP)* (Sept. 26, 2019),

https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf.

⁹ Priscilla Alvarez, *Pregnant Woman Apprehended by Border Patrol Delivers Stillborn Child in Texas*, CNN.COM, June 26, 2019, <https://www.cnn.com/2019/06/26/politics/pregnant-woman-border-patrol-stillborn-child/index.html>.

¹⁰ Nomaan Merchant & Veronica G. Cardenas, *U.S. Tells Migrant Woman Eight Months Pregnant to Wait in Mexico*, ASSOCIATED PRESS, Sept. 6, 2019,

<https://www.apnews.com/965719d5bf5a4d5790820f719ae2a3da>.

¹¹ Letter from James L. Madara, CEO, Am. Med. Ass'n, to Acting Sec'y. Kevin McAleenan, Dep't of Homeland Security (Jul. 10, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-calls-dhs-address-conditions-border-facilities>.

¹² *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (reaffirmed 2019),

<https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on->

Many of the women and girls seeking asylum in the U.S. are fleeing sexual and domestic violence, while others are subjected to such violence while en route to the United States.¹³ Sexual violence victims require specialized medical care, including access to mental health services, testing and treatment for sexually transmitted infections, and, because pregnancy following rape can be re-traumatizing, access to emergency contraception and abortion if desired.¹⁴

Given the significant attention to this issue by advocacy groups, medical experts, media groups, and legislators, the requested records will contribute significantly to the public's understanding of the treatment of pregnant individuals by CBP.

2. *Disclosure is not primarily in the commercial interest of the ACLU.*

Second, the ACLU is not filing this request to further a commercial interest. The ACLU is a 501(c)(3) nonprofit organization and therefore has no commercial interest. The ACLU intends to make any relevant information obtained through this FOIA available to the public.¹⁵ The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU website also includes many features on information obtained through FOIA requests. For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves.¹⁶ The ACLU has also published a number

[Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females.](#)

¹³ See Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CTR. FOR AM. PROGRESS (June 1, 2018),

<https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/>.

¹⁴ See Paul Bouvier, *Sexual Violence, Health and Humanitarian Ethics: Towards a Holistic, Person-Centred Approach*, INT'L REV. OF THE RED CROSS 565, 569 (2014).

¹⁵ See 6 C.F.R. § 5.11(k)(1)(ii); 6 C.F.R. § 5.11(k)(3).

¹⁶ The Torture Database, <https://www.thetorturedatabase.org> (last visited Sept. 19 2019); see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia->

of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, in February 2017 the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program. The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the ACLU plans to disseminate the information disclosed as a result of this Request to the public at no cost.

3. *The ACLU also qualifies for a fee waiver because it is representative of the news media and the records are not sought for commercial use.*

The ACLU is also entitled to a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see supra*; also *Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *ACLU v. U.S. Dep't 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”).

Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. For example, the ACLU regularly publishes *ACLU Magazine* that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 950,000 households. The ACLU also publishes regular updates and alerts via email to approximately 4 million subscribers (both ACLU members and nonmembers). These updates are additionally broadcast to 4.9 million social media followers (members and non-members). The magazine, email, and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,¹⁷ and ACLU

collection/tsa-behavior-detection-foia-database; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

¹⁷ *See, e.g.*, Press Release, ACLU, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu>

attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹⁸ Similarly, ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.¹⁹ This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee.

The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties. The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>.

Underscoring this point, courts have found that other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s are “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5, 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 purposes of the FOIA); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Judicial Watch, Inc. v. DOJ*, 133 F.

lawsuit; Press Release, ACLU, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>.

¹⁸ *See, e.g.,* Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler).

¹⁹ *See, e.g.,* Manar Waheed, *Customs and Border Protection Violated Court Orders During the First Muslim Ban Implementation* (Jan. 24, 2018, 3:45 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/customs-and-border-protection-violated-court>; Vera Eidelman, *We Sued for Records About Trump’s Muslim Bans. Here’s What We Found Out*. (Oct. 24, 2017, 3:15 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/we-sued-records-about-trumps-muslim-bans-heres>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Galen Sherwin, ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (May 27, 2016), <https://www.aclu.org/report/leaving-girls-behind>.

Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).²⁰

As a representative of the news media, the ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use. On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”²¹ A fee waiver would fulfill Congress’s legislative intent in amending FOIA.²² Additionally, on account of these factors, the ACLU has not been charged fees associated with responding to FOIA requests on numerous occasions.²³

In sum, because disclosure of the requested documents is in the public interest and not primarily in the commercial interest of the requester, and because the ACLU is a representative of the news media, the ACLU is entitled to a total waiver of fees associated with this Request and should, in no event, be required to pay more than reasonable standard charges for document duplication. In the event

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²⁰ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

²¹ For example, in May 2016, the FBI granted a fee-waiver request regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ.

²² *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 requestors.’”) (citation omitted); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) (“[FOIA’s] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.”) (internal quotation marks and citation omitted).

²³ For example, in August 2016, the ICE FOIA Office and DHS Privacy Office both granted fee waivers to the ACLU for a FOIA request seeking a DHS OIG super-memorandum and ICE’s response to that memorandum. Similarly, in March 2016, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about selected deaths in detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office. In July 2015, the ICE Office of the Principal Legal Advisor granted a fee waiver to the ACLU for a FOIA request seeking records about the use of segregation in ICE detention, reversing an incorrect denial of a fee waiver by the ICE FOIA Office.

that you decide not to waive the fees, please provide me with prior notice so that we can discuss arrangements.

Expedited Processing Request

The ACLU requests expedited processing of this Request pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e). There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 6 C.F.R. 5.5(e)(1)(ii).

1. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II). As detailed *supra*, the ACLU has the ability and intention to widely disseminate the requested information through a variety of sources, including reports, newsletters, news briefings, right-to-know handbooks, and other materials, to the public at no cost. Indeed, obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).²⁴ Moreover, as mentioned *supra*, the ACLU intends to distribute the information obtained through this FOIA request via the ACLU website and/or means available to us.

2. *The records sought are urgently needed to inform the public about actual or alleged government activity.*

The requested records are also urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). For the reasons described *supra*, the requested records pertain to the identification and treatment of pregnant individuals apprehended by CBP, in CBP custody, or subject to the Migrant Protection Protocol (MPP) are a matter of widespread interest, and

²⁴ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11.

the requested records will inform the public concern of this activity by a government agency, namely CBP. 5 U.S.C. § 552(a)(6)(E)(i)(I). These reports raise immediate concerns about the widespread and system-wide failures with life and death consequences for migrants who encounter CBP. The requested records are essential to fully understand the government's role in the treatment of pregnant individuals in CBP custody or part of the MPP program. This issue continues to receive ongoing public, media, and congressional attention. Thus, the urgency to inform the public goes beyond the general public interest in government transparency—it responds to ongoing serious concerns from Congress and the public, and will answer specific questions that have very recently been raised regarding identification and treatment of pregnant individuals apprehended by CBP, in CBP custody, or subject to the Migrant Protection Protocol (MPP).

Furthermore, denial of expedited disclosure of the requested records 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); 6 C.F.R. § 5.5(e)(1)(i). Major medical organizations, including the American Medical Association, have criticized the CBP's treatment of pregnant individuals.²⁵ As noted above, pregnant individuals apprehended by CBP or in CBP custody have faced inadequate access to medical and mental health care, food and water, and endured unsafe living conditions. CBP officials have reportedly shackled pregnant asylum seekers around their hands, legs, and bellies and denied them medical care; several pregnant individuals have suffered miscarriages in CBP custody.²⁶ In recent months, CBP has encountered dozens of pregnant asylum seekers at the U.S.-Mexico border who have been subject to inadequate access to medical and mental health care, inadequate access to food and water, and unsafe living conditions.²⁷ In June 2019, news reports revealed that a pregnant woman apprehended by Border Patrol agents in McAllen, Texas delivered a stillborn baby.²⁸ In September 2019, CBP agents took measures to stop contractions of a pregnant asylum seeker in labor, and forced her away from the United States to return to Mexico, citing the MPP policy.²⁹

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

²⁵ Press Release, American Medical Association, *AMA Calls on DHS to Address Conditions at Border Facilities* (Jul. 11, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-calls-dhs-address-conditions-border-facilities>.

²⁶ Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS, July 9, 2018, <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

²⁷ Complaint from ACLU to DHS Office of Inspector General, *Pregnant Women Returned to Mexico under the Migrant Protection Protocols (MPP)* (Sept. 26, 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf.

²⁸ Priscilla Alvarez, *Pregnant Woman Apprehended by Border Patrol Delivers Stillborn Child in Texas*, CNN.COM, June 26, 2019, <https://www.cnn.com/2019/06/26/politics/pregnant-woman-border-patrol-stillborn-child/index.html>.

²⁹ Nomaan Merchant & Veronica G. Cardenas, *U.S. Tells Migrant Woman Eight Months Pregnant to Wait in Mexico*, ASSOCIATED PRESS, Sept. 6, 2019, <https://www.apnews.com/965719d5bf5a4d5790820f719ae2a3da>.

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi) and 6 C.F.R. § 5.5(d)(3).

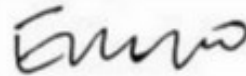
Thank you for your prompt attention to this Request. We look forward to your reply to this Request within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I) and 6 C.F.R. § 5.5(e)(4). Please furnish all responsive records to:

Eunice Cho
ACLU National Prison Project
915 15th St. NW, 7th Floor
Washington, DC 20005
echo@aclu.org

If this Request is denied in whole or part, we ask that you justify all deletions by reference to specific exemptions of the FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information, or to deny a waiver of fees. Please call me at (202) 548-6616 if you have any questions or wish to obtain further information about the nature of the records in which we are interested.

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

Respectfully,



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