

December 15, 2021

SENT VIA E-MAIL

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
Email: ICE-FOIA@dhs.gov

Re: FOIA Request for Records Related to COVID-19 Policies and Practices in Immigration Detention Facilities (Fee Waiver & Expedited Proceeding Requested)

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”) for policies, documents and data related to the provision of COVID-19 vaccines and boosters to individuals in U.S. Immigration and Customs Enforcement (“ICE”) detention, as well as information regarding the implementation of the COVID-19 vaccine mandate on federal contractors and subcontractors. 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(d). The justification for the fee waiver and expedited processing are set out in detail below.

I. Background

Since March 2020, the worldwide pandemic being caused by the novel coronavirus, COVID-19, has been and continues to pose an unprecedented threat to the people locked in congregate settings like immigration detention facilities. As early as February 25, 2020, medical experts to the Department of Homeland Security (“DHS”) warned of the danger of rapid spread of COVID-19 in ICE detention and recommended release of most immigrant detainees.¹ In response to changes in interior enforcement activity,² litigation throughout the country,³ and expulsions at

¹ Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

² U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19: Frequently Asked Questions (FAQs)* (updated May 27, 2020), <https://www.ice.gov/coronavirus#faqs>.

³ *See, e.g.*, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, *COVID-19 Pandemic Response Requirements, Version 7.0* 10, 27–28 (Oct. 19,



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the southern border,⁴ the number of detained individuals in ICE custody has dropped to as low as just over 13,000 on average per day in early 2021.⁵ Nevertheless, the COVID-19 pandemic has revealed ICE's inability to protect the health and safety of those in its custody: as of December 13, 2021, ICE reported at least 31,441 positive cases for COVID-19 among immigrant detainees⁶ (a likely undercount due to the lack of testing⁷); fiscal year 2020 saw the highest death toll of individuals in ICE custody⁸; and, ICE's frequent transfer of people between detention facilities and for removal sparked further COVID-19 outbreaks at new facilities,⁹ their surrounding communities,¹⁰ and in other countries.¹¹ COVID-19 infection rates in ICE detention facilities are 20 times higher than in the general public.¹² And COVID-19 continues to pose a grave danger to people in ICE detention, particularly as new COVID-19 variants have emerged, highlighting the importance of continued, aggressive measures against the virus.¹³



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2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>; Ashoka Mukpo, *What's It Like To Be In Immigration Lockup During A Pandemic*, ACLU.org (Aug. 24, 2020), <https://www.aclu.org/news/immigrants-rights/whats-it-like-to-be-in-immigration-lockup-during-a-pandemic/>.

⁴ See, e.g., TRAC Immigration, *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise* (Mar. 15, 2021), <https://trac.syr.edu/immigration/reports/640/>.

⁵ See *id.*; see also Joel Rose, *Beyond the Border, Fewer Immigrants Being Locked Up But ICE Still Pays for Empty Beds*, NPR (Apr. 1, 2021), <https://www.npr.org/2021/04/01/982815269/beyond-the-border-fewer-immigrants-being-locked-up-but-ice-still-pays-for-empty->.

⁶ U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19: Detainee Statistics* (updated Dec. 14, 2021), <https://www.ice.gov/coronavirus#detStat>.

⁷ See, e.g., ACLU SoCal, *1,900 Test Kits Were Sent to the Detention Center, but Few Were Used* (Aug. 11, 2020), <https://www.aclusocal.org/en/press-releases/ice-secretly-bans-covid-19-testing-adelanto-detainees>.

⁸ Catherine Shoichet, *The Death Toll in ICE Custody Is the Highest It's Been in 15 Years*, CNN.com (Sept. 30, 2020), <https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html>.

⁹ See, e.g., Antonio Olivo and Nick Miroff, *ICE Flew Detainees to Virginia So the Planes Could Transport Agents to D.C. Protests. A Huge Coronavirus Outbreak Followed*, Wash. Post (Sept. 11, 2020), https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html.

¹⁰ See, e.g., John Washington, *ICE Mismanagement Created Coronavirus "Hotbeds of Infection" in and around Detention Centers*, The Intercept (Dec. 9, 2020), <https://theintercept.com/2020/12/09/ice-covid-detention-centers/>.

¹¹ See, e.g., Emily Kassie and Barbara Marcolini, *How ICE Exported the Coronavirus*, The Marshall Project (Jul. 10, 2020), <https://www.themarshallproject.org/2020/07/10/how-ice-exported-the-coronavirus>.

¹² Isabelle Niu & Emily Rhyne, *4 Takeaways From Our Investigation Into ICE's Mishandling of Covid-19* (updated Apr. 26, 2021), <https://www.nytimes.com/2021/04/25/video/immigration-detention-covid-takeaways.html?searchResultPosition=2>; see also Washington Post, *ICE Is the Superspreader Agency* (May 2, 2021), https://www.washingtonpost.com/opinions/ice-is-the-superspreader-agency/2021/05/01/eb079944-a9f2-11eb-8c1a-56f0cb4ff3b5_story.html.

¹³ See, e.g., The White House, *President Biden Announces New Actions to Protect*

These numbers underscore the continued need for robust action against COVID-19 to protect detained people in ICE custody. Yet even at this point in the pandemic, ICE has failed to act in two critical ways. *First*, ICE has no plan in place to ensure that detention facilities provide detained people with COVID-19 booster vaccine doses. Just as ICE failed to adopt a comprehensive plan to provide COVID-19 vaccines to people in its custody¹⁴ until far into 2021,¹⁵ detained people and advocates nationwide have reported that booster shots have not been made available, even after the Centers for Disease Control and Prevention (CDC) recommended it for all eligible adults in high-risk settings, like detention centers.¹⁶

Second, ICE has failed to require that all federal contractors that own or operate immigration detention facilities implement COVID-19 staff vaccination mandates under the terms of Executive Order (EO) 14042.¹⁷ This is of special concern as detention facility staff have had much higher rates of vaccine hesitancy,¹⁸ and as they are primary vectors for the spread of COVID-19 in detention facilities.¹⁹



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Americans Against the Delta and Omicron Variants as We Battle COVID-19 this Winter (Dec. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/>.

¹⁴ See, e.g., ACLU Letter to Secretary Mayorkas and Acting Director Johnson, Re: COVID-19 Vaccine Availability in ICE Detention Facilities (May 27, 2021),

<https://www.aclu.org/letter/letter-dhs-secretary-mayorkas-regarding-vaccine-access> (regarding ICE's failure to provide a coordinated vaccine strategy for people in detention).

¹⁵ U.S. Immigration & Customs Enf't, ERO COVID-19 Pandemic Response Requirements, Version 7.0 25 (Oct. 19, 2021),

<https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

¹⁶ Centers for Disease Control & Prevention, CDC Statement on ACIP Booster Recommendations (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-booster-recommendations-.html> (recommending boosters for those who had received primary series of Pfizer vaccine, especially for those with underlying medical conditions or people in high-risk institutional settings); Centers for Disease Control & Prevention, CDC Expands Eligibility for COVID-19 Booster Shots (Oct. 21, 2021),

<https://www.cdc.gov/media/releases/2021/p1021-covid-booster.html> (expanding booster eligibility to those who had received Johnson & Johnson and Moderna vaccines).

¹⁷ Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sept. 9, 2021).

¹⁸ Jemima McEvoy, *Prison Inmates More Vaccinated Than Corrections Staff In At Least 13 States*, Forbes (Sept. 30, 2021),

<https://www.forbes.com/sites/jemimamcevoy/2021/09/30/prison-inmates-more-vaccinated-than-corrections-staff-in-at-least-13-states/?sh=6aa7d1894ebb>; UCLA, COVID Behind Bars Data Project (last visited Dec. 4, 2021), <https://uclacovidbehindbars.org/> (showing vaccination rate of state and federal prison staff as low as 23% and 44 to 59%); Wanda Bertram & Wendy Sawyer, *With the majority of corrections officers declining the COVID-19 vaccine, incarcerated people are still at serious risk*, Prison Policy Initiative (Apr. 22, 2021), <https://www.prisonpolicy.org/blog/2021/04/22/vaccinerefusal/>.

¹⁹ Julie A. Ward et al., COVID-19 Cases Among Employees of U.S. Federal and State Prisons, AM. J. OF PREVENTATIVE MEDICINE 60:6 (June 1, 2021) (finding that COVID-19 cases were more prevalent in prison staff than among the U.S. population); see also



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II. Records Requested

The ACLU seeks the records described below related to all ICE detention facilities in the states of Arizona, California, Colorado, Florida and Texas that are not subject to an Intergovernmental Service Agreement (IGSA)²⁰:

- A. All contracts currently in force for these facilities (including all modifications, rescissions, extensions, and addendums thereto entered after September 9, 2021), including any options or provisions that may incorporate requirements for staff vaccinations against COVID-19.
- B. All policies, memoranda, postings, and other mass communications with staff at these facilities related to mandatory staff vaccinations against COVID-19 and/or testing for COVID-19.
- C. Educational materials provided to people detained at these facilities or posted so as to be accessible to people detained at these facilities containing information regarding vaccination against COVID-19.
- D. Policies at these facilities regarding the provision of booster shots of vaccinations against COVID-19 to people in their custody.
- E. Spreadsheets, compilations, database printouts, or other similar documents that would allow the ACLU to determine:
 - i. The total number of people currently housed at each of these facilities who have been offered an initial dose (or two-dose initial course) of a vaccine against COVID-19;
 - ii. The total number of people currently housed at each of these facilities who have received an initial dose (or two-dose initial course) of a vaccine against COVID-19;

Hernandez Roman v. Wolf, 829 F. App'x 165, 167–68 (9th Cir. 2020) (describing outbreak following failure to test staff and detainees); Order Granting Motion for Temporary Restraining Order, *Zepeda Rivas v. Jennings*, No. 20-cv02731-vc (N.D. Cal. Aug. 6, 2020), ECF No. 500 (same).

²⁰ These include but are not limited to: CCA Florence Correctional Center (AZ); Otay Mesa Detention Center (CA); Imperial Regional Detention Center (CA); Aurora Contract Detention Facility (CO); Krome North Service Processing Center (FL); El Paso Service Processing Center (TX); Houston Contract Detention Facility (TX); Karnes County Family Residential Center (TX); Montgomery ICE Processing Center (TX); Port Isabel Processing Center (TX); Rio Grande Detention Center (TX); and, South Texas Family Residential Facility (TX).

- iii. The total number of people currently housed at each of these facilities who have been offered a booster shot of a vaccination against COVID-19; and,
- iv. The total number of people currently housed at each of these facilities who have received a booster shot of a vaccination against COVID-19.

III. Fee Waiver Request

The ACLU requests that any fees associated with 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).

A. 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. Advocacy groups, medical experts, media groups, legislators, and many other groups have paid significant attention to immigration enforcement activities in general, as well as the treatment of those in ICE custody specifically.²¹

²¹ *See, e.g.*, Congressional Letter to Director of Domestic Policy Susan Rice and DHS Secretary Alejandro Mayorkas Urging Executive Action on ICE Detention (Mar. 15, 2021), https://omar.house.gov/sites/omar.house.gov/files/Rice_Mayorkas_detention_letter.pdf; Congressional Letter to DHS Secretary Mayorkas Urging Closure of Three ICE Detention Facilities in CA (Oct. 21, 2021), <https://lofgren.house.gov/sites/lofgren.house.gov/files/CA%20ICE%20Detention%20Letter.pdf>; Letter to Members of Congress Re: FY 2022 Department of Homeland Security (DHS) Appropriations Bill (Aug. 17, 2021), https://omar.house.gov/sites/omar.house.gov/files/Rice_Mayorkas_detention_letter.pdf (signed by 192 non-governmental organizations urging significant reduction of funding for ICE detention); ACLU Letter to DHS Secretary Mayorkas Regarding ICE Detention (Apr. 28, 2021), <https://www.aclu.org/letter/letter-dhs-secretary-mayorkas-regarding-ice-detention>; Tom Dreisbach, *Exclusive: Video Shows Controversial Use Of Force Inside An ICE Detention Center*, NAT. PUB. RADIO (Feb. 6, 2020), <https://www.npr.org/2020/02/06/802939294/exclusive-video-shows-controversial-use-of-force-inside-an-ice-detention-center>; Camilo Montoya-Galvez, *DHS watchdog finds widespread mistreatment of immigrants at ICE facility*, CBS NEWS (Apr. 2, 2021), <https://www.cbsnews.com/news/immigration-mistreatment-ice-detention-dhs-inspector-general/>; Philip Marcelo & Gerald Herbert, *Immigration detentions soar*



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This attention has carried through the COVID-19 pandemic.²² No event in recent memory has so suddenly changed the day to day life for nearly all Americans than this worldwide epidemic. Nearly every institution, economic sector, and government agency has had to make significant changes in response to the pandemic. Yet, there is insufficient information that is publicly available about ICE's policies and practices related to the health and safety of individuals in its custody, even though they face a far higher risk of contracting COVID-19 than the general population.²³ The records sought in this Request are certain to contribute significantly to the public's understanding on this important issue.

B. 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.²⁴ 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

despite Biden's campaign promises, AP (Aug. 5, 2021), <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d>.

²² See, e.g., Maura Turcotte, *Virus cases are surging at crowded immigration detention centers in the U.S.*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/us/covid-immigration-detention.html>; Camilo Montoya-Galvez, *Vaccination rate among immigrants held by ICE remains low as infections surge*, CBS NEWS (July 9, 2021), <https://www.cbsnews.com/news/vaccination-rate-among-immigrants-held-by-ice-remains-low-as-infections-surge/>; Congressional Letter to DHS Secretary Mayorkas & Acting Director Tae Johnson (June 9, 2021), <https://www.warren.senate.gov/imo/media/doc/06.09.21%20Letter%20to%20DHS%20and%20ICE%20re%20protection%20of%20immigrants%20released%20due%20to%20COVID-19.pdf>.

²³ See *supra* n.12.

²⁴ See 6 C.F.R. § 5.11(k)(1)(ii); 6 C.F.R. § 5.11(k)(3).



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killing, and links to the documents themselves.²⁵ The ACLU has also published a number 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.

A. *The ACLU also qualifies for a fee waiver because it is a 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 also Nat'l Sec. Archive v. U.S. Dep't of Def.*, 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

²⁵ 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-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.



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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,²⁶ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²⁷ Similarly, ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.²⁸ 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



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²⁶ *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-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>.

²⁷ *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).

²⁸ *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>.

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. v. U.S. Dep't of Def.*, 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 Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).²⁹

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."³⁰ A fee waiver would fulfill Congress's legislative intent in amending FOIA.³¹ Additionally, on account of these factors, the ACLU has not been charged fees associated with responding to FOIA requests on numerous occasions.³²

²⁹ 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 v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

³⁰ 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.

³¹ *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).

³² 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



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

IV. 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).

A. *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*, 321 F. Supp. 2d at 29 n.5 (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”).³³ Moreover, as mentioned *supra*, the ACLU intends to distribute the information obtained through this FOIA request via the ACLU website and/or other means available to us.

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.

³³ 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.



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B. 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). Specifically, the requested records pertain to ICE's policies and practices regarding individuals in its custody during the COVID-19 pandemic. As described *supra*, this is a matter of widespread media and public interest, and the requested records will inform the public concern of this activity by ICE. 5 U.S.C. § 552(a)(6)(E)(i)(I). Immigration detention conditions, especially decisions by ICE regarding the health and safety of those in its custody, are of enormous public concern.³⁴ This request will shed critical light on ICE's actions in the face of the unprecedented crisis caused by the COVID-19 pandemic on individuals locked in immigration detention centers.

Furthermore, denial of expedited disclosure of the requested records involving ICE's response to COVID-19 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(d)(1)(i). As of December 14, 2021, the COVID-19 pandemic has killed over 796,000 people and infected over 50 million people in the United States alone.³⁵ Despite the availability of COVID-19 vaccines, the pandemic is far from over. The CDC has recognized that individuals in certain settings like detention centers continue to face a heightened risk due to the possibility of breakthrough infections and rise of variants, like the more contagious and possibly more dangerous Delta variant.³⁶ The recent discovery of the Omicron variant, another "variant of concern" according to the World Health Organization,³⁷ reflects the imminent danger that COVID-19 continues to pose, especially to those in detention settings. According to ICE's own reporting, over 31,440 people in ICE custody have tested positive for COVID-19 thus far,³⁸ and nine individuals have died from COVID-19 while in ICE custody in 2020 alone³⁹; this does not include the unknown numbers of other cases that went undetected due to lack of testing and serious illness or death that ICE did not officially link to COVID-19 due to releases. The requested records are

³⁴ *See supra* n.21–22.

³⁵ Centers for Disease Control and Prevention, COVID-19 Data Tracker (last visited Dec.14, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

³⁶ Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (updated June 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

³⁷ World Health Organization, Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern (Nov. 26, 2021), [https://www.who.int/news/item/26-11-2021-classification-of-omicron-\(b.1.1.529\)-sars-cov-2-variant-of-concern](https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern).

³⁸ *See supra* n.6.

³⁹ *See supra* n.8.



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essential to fully understand the government's treatment of individuals who are in its custody, particularly regarding access to booster shots and the implementation of the vaccine mandate on staff working at ICE detention facilities.

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

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)(E)(ii) and 6 C.F.R. § 5.5(e)(4). Please furnish all responsive records to:

My Khanh Ngo
ACLU Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111
Telephone: 415-343-0764
Email: mngo@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 reach me at mngo@aclu.org or 415-343-0764 if you have any questions or wish to obtain further information about the nature of the records in which we are interested.

Sincerely,



My Khanh Ngo



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