

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.: _____

**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 a FOIA request sent by the ACLU-NH on March 25, 2019 (“Request”), and to promptly disclose the requested records.

The Request seeks records concerning CBP’s local immigration enforcement (patrol operations) in New Hampshire. Specifically, the Request seeks records regarding (1) Defendant’s non-checkpoint patrol operations in New Hampshire, (2) its communications with local law enforcement; and (3) its citizenship inquiry of immigrants. A true and correct copy of the Request is attached as **Exhibit A (FOIA 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.¹ **Exhibit B (Jose)**. In March 2019, CBP followed and detained a noncitizen in Lebanon, New Hampshire. **Exhibit C (Information on Florentin Avila Lucas)**.² In April 2019, CBP officers in plainclothes and an unmarked vehicle detained an immigrant.³ 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).⁴

These are precisely the types of information covered by the ACLU-NH's FOIA request. 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 B and C.*

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

¹ *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>.

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

³ *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.

⁴ Available at https://www.aclu-nh.org/sites/default/files/field_documents/state_v._mccarthy_-_order_5-1-18.pdf.

the Request adequately.

The ACLU-NH further alleges as follows:

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 the 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 the public about civil rights and civil liberty issues across New Hampshire. The 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 Request arises 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, the 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.⁵

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).⁶ 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.⁷

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 C.** Florentin Avila Lucas planned to take his

⁵ 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.

⁶ 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>.

⁷ 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>.

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 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.⁸ Chef Juan Pu and his family were eating lunch in Littleton, New Hampshire.⁹ 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.¹⁰ According to CBP, they were patrolling the Littleton area, nearly 65 driving miles from the Canadian border.¹¹

11. Between July 29 and August 1, 2019, CBP conducted several patrols that resulted in the apprehension of 18 undocumented immigrants.¹² One of the apprehended immigrants was Jose. **Exhibit B.** 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

⁸ *See supra* fn. 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See supra* fn. 1.

immigrants through their patrol operations.¹³

Plaintiff's FOIA Request

13. On March 25, 2019, ACLU-NH submitted the Request through the U.S. government's FOIA online website.¹⁴ *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"). **Exhibit A.**

14. The Request seeks 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. Because no adequate search has yet been completed, the period covered by the Request is ongoing.

15. Specifically, the 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:

- a. 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;
- b. 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;
- c. 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;

¹³ *Id.*

¹⁴ <https://foiaonline.gov/foiaonline/action/public/home>.

- d. 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;
- e. 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 location and duration of the person's detention, if applicable;
 - e) the date of the person's voluntary departure from the United States, if applicable;
 - f) the date of the person's removal from the United States, if applicable.

Exhibit A.

16. The Request includes an application 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.

Exhibit A. As set forth above, there is an urgent need for public transparency and information about how CBP is carrying out its activities in New Hampshire.

17. Furthermore, the Request details that the 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 the 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. **Exhibit A.**

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

19. The Request also includes an application 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, the ACLU-NH emphasized that the Request 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 Request also made clear that the ACLU-NH plans to disseminate the information disclosed as a result of the Request to the public at no cost. **Exhibit A.**

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

Agency’s Response

21. CBP failed to comply with its statutory obligation to respond to the Request.

22. CBP has a legal duty under the FOIA to determine whether to comply with a request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receiving the request and also have a legal duty to immediately notify a requester for the agency’s determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).

23. Put another way, “[t]he statute requires that, within the relevant time period, an agency must determine whether to comply with a request – that is, whether a requester will receive

all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

24. CBP failed to determine whether to comply with the Request within 20 business days after receiving the Request.

25. Specifically, 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 D**. Rather, the letter simply states that the ACLU-NH should submit its FOIA request to CBP electronically, notwithstanding that the ACLU-NH had already submitted the FOIA request through “FOIAonline.” *See Exhibit A*.

26. On May 3, 2019, CBP fully granted the request for expedited treatment and for a fee waiver. **Exhibits E and F**. However, CBP failed to state whether or by when it would respond to the Request. *Id.* The correspondence from May 3, 2019, was CBP’s last response to the Request. **Exhibit G**.

27. Accordingly, CBP improperly failed to provide a determination within the statutory deadline, 5 U.S.C. § 552(a)(6)(A)(i).

28. The 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

29. Since the Request was filed on March 2019, there continues to be a strong public interest in the requested records regarding local immigration enforcement.

30. 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.¹⁵ *See Exhibit B.*

31. 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 B* 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.

32. 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 PROVIDE A DETERMINATION WITHIN 20 BUSINESS DAYS

33. All prior paragraphs are incorporated.

34. CBP has a legal duty under FOIA to determine whether to comply with a request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receiving the request, and also have a legal duty to immediately notify a requester of the agency’s determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).

35. In violation of 5 U.S.C. § 552(a)(6)(A)(i), and applicable regulations promulgated thereunder, CBP failed to determine whether to comply with the Request within 20 business days after receiving the Request.

COUNT II VIOLATION OF FOIA FOR FAILURE TO MAKE RECORDS PROMPTLY AVAILABLE

¹⁵ *See supra* fn. 1, available at <https://www.vnews.com/Border-patrol-agents-apprehend-18-people-in-Upper-Valley-27701561>.

36. All prior paragraphs are incorporated.

37. The ACLU-NH has a legal right under FOIA to obtain the specific agency records requested on March 25, 2019, and there exists no legal basis for CBP's failure to properly make the requested records available to ACLU-NH, its members, and the public.

38. On information and belief, CBP currently has possession, custody, or control of the requested records.

39. In violation of 5 U.S.C. § 552(a)(3)(A), CBP failed to make available the records sought in the Request promptly.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Assume jurisdiction over this matter;
- B. Declare that Defendant violated FOIA by failing to make a determination whether to comply with the Request within 20 business days;
- C. Declare that Defendant violated FOIA by unlawfully withholding the requested records;
- D. Order Defendant to immediately disclose the requested records to the public and make copies immediately available to Plaintiff without charge for any search or duplication fees, or, in the alternative, provide for expedited proceedings to adjudicate Plaintiff's rights under FOIA;
- E. Award reasonable costs and attorney's fees; and
- F. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

By and through his attorneys affiliated with the
American Civil Liberties Union Foundation of New
Hampshire,

/s/ SangYeob Kim

SangYeob Kim (N.H. Bar No. 266657)
Gilles R. Bissonnette (N.H. Bar. No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW
HAMPSHIRE
New Hampshire Immigrants' Rights Project
18 Low Avenue
Concord, NH 03301
Tel.: 603.333.2081
sangyeob@aclu-nh.org

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