



December 21, 2019

Senior Director of FOIA Operations
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW STOP-0655
Washington, DC 20598-0655

Re: Freedom of Information Act Request for Records Held by the U.S. Department of Homeland Security (DHS)

Dear Senior Director:

The American Immigration Council (Council), the American Immigration Lawyers Association (AILA), and Human Rights Watch (HRW) (“Requesters”) submit the following Freedom of Information Act (FOIA) request for records regarding the Migrant Protection Protocols (“MPP”), otherwise known as “Remain in Mexico,” announced by the Department of Homeland Security (DHS) on January 24, 2019.¹ In accordance with 5 U.S.C. § 552(a)(6)(A)(i), we expect a response to this request within 20 working days, unless otherwise permitted by statute.

1. REQUEST FOR INFORMATION

For the period December 2019 to the present:

- Instructions, directives, or guidance to U.S. Department of Homeland Security (DHS) employees on the MPP, including but not limited to, the following:
 - Guidance related to how the DHS agencies must process individuals who are not amenable to MPP (e.g., individuals in “special circumstances” and unaccompanied children).²
 - Guidance related to the (1) facilitation of attorney access to tent court facilities and (2) facilitation of access to the tent court facilities for legal observers, reporters, and the public.

¹ Department of Homeland Security, “Migrant Protection Protocols” (January 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

² See Customs and Border Protection, “MPP Guiding Principles” (January 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

- Notes, transcripts, or audio of daily interagency calls on MPP.
- The document titled or referred to as “Red Team Report.”³
- Emails, texts, or other communications relating to the MPP amongst or including the following individuals:
 - Acting Director of U.S. Citizenship and Immigration Services (USCIS) Ken Cuccinelli.
 - Former Acting United States Secretary of Homeland Security Kevin McAleenan.
 - Former United States Secretary of Homeland Security Kirstjen Nielsen.
 - Acting Commissioner of U.S. Customs and Border Protection (CBP) Mark Morgan.
 - Executive Office for Immigration Review (EOIR) Director James McHenry.
 - Senior Advisor to the President Stephen Miller.
- Final agreements, protocols, or other binding documents between the U.S. government and the government of Mexico relating to the MPP.
- Final agreements, protocols, or other binding documents between the U.S. government and the International Organization for Migration (IOM) regarding the Assisted Voluntary Return Program (AVRP) for people in MPP.
- Data or information regarding individuals subject to MPP who have chosen to return to Mexico through the IOM’s AVRP, including the data used to produce the following statement in the October 28th Assessment of the Migration Protection Protocols: “As of mid-October, almost 900 aliens in MPP have participated in the AVR program.”⁴

2. FEE WAIVER REQUEST

Requesters seek a fee waiver because the information they seek 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 [requesters]....” 5 U.S.C. § 552(a)(4)(A)(iii).

A. Disclosure Will Contribute to Public Understanding of DHS Operations

As noted previously, DHS announced the MPP, otherwise known as “Remain in Mexico,” on January 24, 2019, imposing the requirement that asylum-seekers wait in Mexico while the U.S. government adjudicates their asylum claims. Mandating that asylum-seekers wait in Mexico while they pursue their asylum claims is an unprecedented shift in U.S. asylum policy and

³ Hamed Aleaziz, “US Border Officials Pressured Asylum Officers To Deny Entry To Immigrants Seeking Protection, A Report Finds,” BuzzFeed News (Nov. 15, 2019), <http://bit.ly/36Fh8Sh>.

⁴ See Department of Homeland Security, “Assessment of the Migrant Protection Protocols” (October 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

procedure. Though this shift implicates serious safety and due process concerns, DHS has not made guidance or information about how the MPP operates available to the public, advocates, attorneys, and asylum-seekers directly impacted by this new program.

Further, while DHS implementation of the MPP is premised on improving the process to seek asylum in the United States, while observing the safety of asylum-seekers, public reporting about the program casts doubts on these purported governmental objectives. Media outlets and non-governmental organizations have exposed the systemic infringement on due process rights, such as the right to notice of and access to court hearings, inherent in the MPP.⁵ Reports have also documented the physical harm – including kidnapping and death - that asylum-seekers have faced while awaiting decisions on their asylum claims in Mexico.⁶

As the agency that oversees immigration enforcement on the U.S.-Mexico border, DHS plays a crucial role in the implementation of the MPP. This request seeks the disclosure of information that will enhance the public's understanding of DHS's operations regarding the program. As outlined further below, Requesters intend to make the information received in response to this request available to the public at no charge. Further, Requesters have significant audience reach, which includes varied segments of the U.S. public.

The Council regularly provides information to the public based on its FOIA requests.⁷ In keeping with its track record of synthesizing or otherwise publishing information on governmental operations gleaned from FOIA requests, the Council intends to post documents received in response to this FOIA request on its publicly accessible website. For calendar year 2019 (January 1, 2019-present), the website had 2.6 million pageviews from 1.5 million unique visitors.

⁵ Molly O'Toole, "Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn," Los Angeles Times (Aug. 28, 2019), <https://lat.ms/2th7YwW>; Human Rights Watch, *U.S. Move Puts More Asylum Seekers at Risk: Expanded 'Remain in Mexico' Program Undermines Due Process* (September 25, 2019), <http://bit.ly/2Ps51T6>; Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (October 2019), <http://bit.ly/34wuyPn>; Judy Perry Martinez, *Due Process Concerns at U.S.-Mexico Border*, American Bar Association (Oct. 2019), <http://bit.ly/2swT7OC>.

⁶ Human Rights Watch, *We Can't Help You Here* (July 2, 2019), <http://bit.ly/2Eo3OG8>; Emily Green, "Trump's Asylum Policies Sent Him Back to Mexico. He Was Kidnapped Five Hours Later By a Cartel.," Vice News (Sept. 16, 2019), <http://bit.ly/2PqPAKH>; This American Life, "The Out Crowd," National Public Radio (Nov. 15, 2019), <http://bit.ly/2PuzK1X>.

⁷ See, e.g., Guillermo Cantor and Walter Ewing, American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (August 2017) (examining records of alleged misconduct by Border Patrol employees), http://bit.ly/Council_StillNoActionTaken; American Immigration Council, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program* (November 2015) (analyzing data obtained from ICE on the CAP program), http://bit.ly/Council_ICE_CAP.

AILA also widely disseminates information to its members and the public in the form of continuing legal education materials, information, and resources, primarily through its website, <https://www.aila.org/>.⁸ Those who visit AILA’s website include immigration attorneys and their individual and employer clients, media representatives, U.S businesses, foreign nationals, law students, elected officials, government employees, and other interested members of the public. Moreover, information posted to AILA’s website is often linked to the websites of other organizations and immigration law firms. AILA also disseminates the information through its newsletters, social media, and other print and electronic publications.

HRW uses its extensive contacts in the media to draw greater attention to the issues, and HRW employees often comment on issues in the media. For example, HRW was mentioned in media 347,234 times in 2018, an average of nearly 1000 a day. HRW’s media mentions spanned 189 countries and at least 58 languages. Human Rights Watch has 4.2 million followers on its English-language Twitter account, and 2.6 million Facebook followers. Human Rights Watch intends to make the information provided in response to this request to publicly available at no charge.⁹

B. Disclosure of the Information Is Not in the Commercial Interest of the Requesters

The Council is a not-for-profit organization and has no commercial interest in the present request. See e.g. 6 C.F.R. § 5.11(k)(3)(i)-(ii). This request furthers the Council’s work to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. As with all other reports and information available on the Council’s website, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge.

AILA is a nonpartisan, 501(c)(6) tax-exempt not-for-profit organization with no commercial interest in the present request. AILA provides its members and the public with continuing legal

⁸ See *AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit*, AILA Doc. No. 13111458 (last updated November 1, 2018), available at <https://www.aila.org/infonet/eoir-records-relating-misconduct>; *CBP Releases Officer’s Reference Tool Documents*, AILA Doc. No. 18112701 (last updated October 21, 2019), available at <https://www.aila.org/infonet/gr-foia-cbp-table>; *FOIA Response Highlights Importance of Independent Judges, Court Reform*, AILA Doc. No. 18040300 (Last Updated April 23, 2018), available at <https://www.aila.org/infonet/foia-response-labor-agreement-between-eoir-naij>.

⁹ See, e.g., Human Rights Watch, *“I Still Need You”: The Detention and Deportation of Californian Parents* (May 2017) (examining records of parents deported and separated from their US citizen children), <https://www.hrw.org/report/2017/05/15/i-still-need-you/detention-and-deportation-californian-parents>; Human Rights Watch, *“Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (April 2009) (examining records related to the practice of removing non-citizens for non-violent, non-serious offenses), <https://www.hrw.org/report/2009/04/15/forced-apart-numbers/non-citizens-deported-mostly-nonviolent-offenses>.

education, information, and resources, primarily through its website, www.aila.org, that is updated daily with the latest immigration news and information, including agency guidance, interpretations and policy memoranda. As described above, AILA seeks the requested information for the purpose of disseminating it to the general public, free of charge.

HRW is a non-governmental organization with no commercial interest in the present request. HRW employs over 450 professionals, among them lawyers, journalists, and academics who work to uncover and report on human rights issues around the world. In order to reach the broadest audience possible, the organization publishes detailed reports on human rights issues of interest to a broad spectrum of people. These reports are made available in print and on Human Rights Watch's website at no charge (<https://www.hrw.org/>).

Given that FOIA's fee-waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

3. REQUEST TO EXPEDITE

Requesters also ask that DHS expedite this request because they can demonstrate that expedited treatment is warranted under the statute and governing regulations. See 5 U.S.C. § 552(a)(6)(E)(I); 6 C.F.R. § 5.5(e). The FOIA is intended to ensure the public has timely access to information regarding governmental operations. This objective is particularly heightened regarding MPP – a program implemented without transparency that directly impacts the lives of thousands of asylum-seekers every day.

As outlined by DHS regulations, a request qualifies for expedited treatment where it is demonstrated that:

“(i) circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information; (iii) The loss of substantial due process rights; or (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.”

6 C.F.R. § 5.5(e). The courts have interpreted the “compelling need” language in the statute to encompass three factors: “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” See *Protect Democracy Project, Inc. v. U.S. Department of Defense*, 263 F.Supp.3d 293, 298-99 (D.C. Cir. 2017) (citing *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001)).

A FOIA request need not meet all criteria but the present request nonetheless meets all requirements for expedited treatment. In the first instance, it has been widely documented that the MPP has resulted in threats to the life and physical safety of thousands of asylum-seekers who are forced to wait in Mexico while the U.S. government adjudicates their asylum claims – asylum-seekers have been kidnapped, physically assaulted and killed.¹⁰

Second, Requesters are primarily engaged in the dissemination of information and intend to make the information they receive via this request available to the public. DHS has released little to no public information regarding this program and the lack of information has generated confusion and concern as asylum-seekers, advocates and the media are unclear about the program's contours and procedures. Given the dangers to asylum-seekers and lack of transparency regarding due process, there is an urgent need for the public to understand how this program operates.

Third, the manner in which the MPP has been designed (to the extent publicly known) appears to have a systemically adverse impact on the due process rights of asylum-seekers, given the lack of clarity regarding immigration court procedures, including as to how asylum-seekers are processed for deportation proceedings, how they receive notice, how they can present and challenge evidence and what the program's access to counsel policies entail.¹¹ These are significant lines of inquiry as all these procedures reflect established due process safeguards that an asylum-seeker must receive in a court proceeding in the United States.

Finally, the MPP is a "matter of widespread and exceptional media interest," which has generated many questions about the "government's integrity," thereby affecting "public confidence." The MPP appears intended to discourage asylum-seekers from seeking protection in the United States, thus conflicting with a long-standing history of welcoming those fleeing persecution. Alarming, asylum officers – DHS employees – have publicly voiced concern about the program's legality and morality, serving to raise legitimate questions about the government's integrity and shaking public confidence in the immigration agencies tasked with enforcing immigration law and administering asylum claims in the United States.¹²

4. EXEMPTIONS

If DHS concludes that statutory exemptions apply to any of the information requested, please describe in detail the nature of the information withheld, the specific exemption or privilege upon

¹⁰ See *supra*, n. 6.

¹¹ See *supra*, n. 5.

¹² Molly O'Toole, "Asylum Officers Rebel Against Trump Policies They Say are Immoral and Illegal," Los Angeles Times (Nov. 15, 2019), <https://lat.ms/36Dx2wD>; Priscilla Alvarez, "Senate Report: Whistleblowers Blast Trump Administration's Immigration Policies," CNN (Nov. 22, 2019), <https://cnn.it/2EriyUk>; Tanvi Misra, "'Remain in Mexico' Policy Faces Internal Critiques at House Hearing," Roll Call (Nov. 29, 2019), <http://bit.ly/2S0buWW>.

which the information is withheld, and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

5. FORMAT OF PRODUCTION

Requesters seek the data in a workable format, such as Microsoft Excel. ***Please also provide a glossary or other descriptive records containing definitions of acronyms, numerical codes or terms contained in data responsive to this request, if those terms are not in the form template and/or publicly defined.***

Pursuant to 5 U.S.C. § 552(a)(vi), I certify the statement in support of the request for expedited treatment to be true and correct to the best of my knowledge and belief.

Thank you in advance for your attention to this request. If you have any questions regarding this request, please feel free to email or call Emily Creighton at the contact information under the first signature block below.

Sincerely,

/s/ Emily Creighton

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