

1 Neela Chakravartula (CA Bar No. 254746)
neela@uclawsf.edu
2 Melissa Crow* (DC Bar No. 453487)
crowmelissa@uclawsf.edu
3 CENTER FOR GENDER AND REFUGEE
STUDIES
4 UC College of the Law, San Francisco
200 McAllister Street
5 San Francisco, CA 94102
Telephone: (415) 565-4877
6

Raul Pinto* (NC Bar No. 42310)
rpinto@immcouncil.org
7 Suchita Mathur* (NY Bar No. 5373162)
smathur@immcouncil.org
8 AMERICAN IMMIGRATION COUNCIL
9 1331 G Street NW, Suite 200
Washington, DC 20005
10 Telephone: (202) 507-7549

11 *Attorneys for Plaintiffs*
AMERICAN IMMIGRATION COUNCIL and
12 CENTER FOR GENDER & REFUGEE
STUDIES
13

14 *Pro hac vice application forthcoming

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

17 AMERICAN IMMIGRATION COUNCIL and
18 CENTER FOR GENDER AND REFUGEE
STUDIES,
19

Plaintiffs,

20 v.
21

22 U.S. CUSTOMS AND BORDER
PROTECTION and U.S. DEPARTMENT OF
HOMELAND SECURITY.
23

Defendants.
24

Case No. 3:23-cv-5270

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

25
26
27
28

1 **INTRODUCTION**

2 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*,
3 seeking to compel U.S. Customs and Border Protection (“CBP”), a component of the U.S. Department
4 of Homeland Security (“DHS”), to immediately release records requested under FOIA relating to
5 CBP’s implementation of new border management measures that require asylum seekers at the
6 southern border to use CBP’s smartphone application, known as CBP One, to schedule inspection
7 appointments at ports of entry (“POE”).

8 2. In recent years, individuals coming to POEs to seek protection in the United States have
9 confronted a variety of obstacles. Beginning on May 12, 2023, CBP implemented a requirement,
10 applicable to the majority of asylum seekers approaching the southern border, that individuals obtain
11 inspection appointments via CBP One prior to presenting at POEs. Because of the language,
12 technological, and financial challenges migrants face in attempting to use the app, this new requirement
13 has important legal and humanitarian consequences for asylum seekers, border communities, and service
14 providers.

15 3. Migrants who are unable to secure an appointment via CBP One must wait indefinitely in
16 dangerous conditions in Mexico or risk losing asylum eligibility under a new regulation if they attempt
17 to present at POEs or cross the southern border between ports. Moreover, recent reports indicate that
18 asylum seekers without appointments are at times turned back at POEs, severely curtailing access to the
19 U.S. asylum process, despite a federal court ruling that refusal to provide inspection to asylum seekers
20 while arriving in the United States is unlawful. *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029,
21 1049 (S.D. Cal. 2022).

22 4. Because of the legal stakes and evolving situation at the southern border, CBP’s adoption
23 of a smartphone app to manage the flow of asylum seekers is the subject of significant media and public
24 interest. To inform the public, and advocates in particular, about the U.S. government’s current
25 treatment of asylum seekers, the American Immigration Council (the “Council”) and the Center for
26 Gender and Refugee Studies (“CGRS”) filed a FOIA request with CBP on July 11, 2023. The request

1 seeks to understand CBP’s policies regarding migrants without CBP One appointments who approach
2 POEs to seek asylum.

3 5. In the FOIA request, Plaintiffs sought expedited processing due to the urgent need to
4 inform the public about CBP’s recent practices at POEs, and because the request implicated the due
5 process rights of asylum seekers impacted by those practices. *See Al Otro Lado*, 619 F. Supp. 3d at
6 1040.

7 6. Nonetheless, CBP has not responded to Plaintiffs’ request, including Plaintiffs’ request
8 for expedited processing.

9 7. Immediate disclosure of the requested records is necessary for a better understanding of
10 the federal government’s current treatment of asylum seekers, many of whom are individuals and
11 families stranded in dire conditions, given the evolving policies and practices at the U.S.-Mexico border.

12 8. Plaintiffs bring this action under the FOIA for declaratory, injunctive, and other
13 appropriate relief.

14 **JURISDICTION**

15 9. This Court has jurisdiction under 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i), (a)(6)(E)(iii).
16 Because this action arises under FOIA against an agency of the United States, this Court also has
17 jurisdiction over this action pursuant to 28 U.S.C. § 1331.

18 10. This Court has jurisdiction to grant declaratory and further necessary or proper relief
19 pursuant to 5 U.S.C. §§ 552(a)(4)(B) and (a)(6)(E)(iii), 28 U.S.C. §§ 2201-2202.

20 11. The Plaintiffs have exhausted any and all administrative remedies in connection with this
21 FOIA request.

22 **VENUE**

23 12. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1)
24 because CGRS’ principal place of business is in this district.

1 **INTRADISTRICT ASSIGNMENT**

2 13. Assignment of this action to the San Francisco Division of this Court is warranted
3 pursuant to Civil L.R. 3-2, because Plaintiff CGRS is headquartered in San Francisco, California.

4 **PARTIES**

5 14. Plaintiff American Immigration Council (the “Council”) is a tax-exempt, not-for-profit
6 educational and charitable organization under Section 501(c)(3) of the Internal Revenue Code, with its
7 principal place of business at 1331 G Street NW, Suite 200, Washington, D.C. 20005. Founded in 1987,
8 the Council works to increase public understanding of immigration law and policy, advocate for the fair
9 and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the
10 public about the enduring contributions of America’s immigrants. Through its research and analysis, the
11 Council has become a leading resource for policymakers and opinion makers at the national, state, and
12 local levels who seek to understand the power and potential of immigration and to develop policies that
13 are based on facts rather than myths. The Council also seeks, through court action and other measures, to
14 hold the government accountable for unlawful conduct and restrictive interpretations of the law and for
15 failing to ensure that the immigration laws are implemented and executed in a manner that comports
16 with due process.

17 15. Plaintiff Center for Gender and Refugee Studies (“CGRS”) is a nonpartisan organization
18 based at the University of California College of the Law, San Francisco, with its principal place of
19 business at 200 McAllister Street, San Francisco, CA 94102. Through litigation, scholarship, policy
20 recommendations, and in-depth training and technical assistance, CGRS defends the human rights of
21 courageous refugees seeking asylum in the United States. Founded to advocate for women fleeing
22 gender-based violence, CGRS has grown into an internationally respected resource for asylum more
23 generally, renowned for our knowledge of the law and ability to combine sophisticated legal strategies
24 with policy advocacy and human rights interventions. CGRS takes the lead on controversial issues,
25 participates as co-counsel or amicus curiae in impact litigation, produces an extensive library of
26 litigation support materials, maintains an unsurpassed database of asylum records and decisions, and

1 works in coalitions with immigrant, refugee, LGBTQ+, children's, and women's rights networks. CGRS
2 also engages in international human rights work to address the underlying causes of forced migrations
3 that produce refugees. CGRS publishes practice advisories, reports, policy analysis, and other
4 educational materials that are widely disseminated, including through its website. Many of these
5 resources are publicly available, and litigation support materials are accessible to registered users—
6 including members of tax-exempt organizations, non-profit groups, lawyers, academics, law students,
7 refugees, and asylum seekers—free of charge. CGRS also publishes an electronic newsletter distributed
8 to subscribers via email, regularly conducts nationwide trainings and webinars, and releases information
9 via social media platforms such as Twitter and Facebook. CGRS will make widely available to the
10 public information requested through this FOIA request via its website and/or by other means discussed
11 above.

12 16. Defendant DHS is an agency of the United States government and an agency within the
13 meaning of 5 U.S.C. § 552(f).

14 17. Defendant CBP is a component of DHS, 8 C.F.R. § 100.1, and an agency within the
15 meaning of 5 U.S.C. § 552(f). CBP has been delegated authority to administer certain provisions of the
16 Immigration and Nationality Act. *See id.*

17 18. Among other duties, CBP is responsible for enforcing immigration laws at POEs to the
18 United States, including at POEs along the U.S.-Mexico border. The agency has the authority to inspect
19 individuals, such as asylum seekers, seeking to enter the United States. CBP is responsible for the initial
20 screening and processing of asylum seekers when they present themselves for inspection at U.S. POEs.

21 STATEMENT OF FACTS

22 ***Background – Treatment of Asylum Seekers at Ports of Entry at the Southern Border.***

23 19. Individuals from around the world continue to look to the United States for refuge in the
24 face of violence, persecution, and political, economic, and environmental crises. Since 2016, however,
25 individuals seeking protection in the United States who approach POEs have faced a variety of obstacles
26 to accessing the U.S. asylum system. These include CBP's policy and practice of "metering," which

1 restricts the number of asylum seekers who are inspected at POEs on a given day; the implementation of
2 the Title 42 policy in response to the global COVID-19 pandemic, which functionally closed POEs to
3 undocumented noncitizens; and the recently promulgated Circumvention of Lawful Pathways rule.

4 20. The conditions asylum seekers face in northern Mexico while waiting for the opportunity
5 to access asylum are dire. They include widespread violence, lack of access to shelter and medical
6 services, and extreme economic deprivation.

7 21. As a result of these circumstances, thousands of asylum seekers at or near the U.S.-
8 Mexico border, and the organizations that provide services to them, urgently need concrete information
9 about how CBP is managing the inspection and processing of migrants.

10 22. CBP officers must inspect all noncitizens who arrive in the United States at a POE, *see* 8
11 U.S.C. § 1225(a)(3), and determine whether individuals may be admitted to the United States, *see* 8
12 U.S.C. § 1182(a). Noncitizens who are physically present in the United States or who arrive in the
13 United States at a POE have a statutory right to apply for asylum. 8 U.S.C. § 1158(a)(1). If an individual
14 expresses a fear of returning to his or her home country, CBP must refer the asylum seeker for a credible
15 fear interview or place the asylum seeker into regular removal proceedings by issuing a Notice to
16 Appear, which allows the asylum seeker to pursue an asylum claim before an immigration judge. *See* 8
17 U.S.C. §§ 1225(b)(1), 1229, 1229a.

18 23. Since January 2023, CBP has used a smartphone application called CBP One to allow
19 noncitizens to directly make appointments for inspection at POEs along the U.S.-Mexico border. As
20 media outlets and migrant-rights organizations have reported, however, using a smartphone and
21 successfully navigating a complex app like CBP One can be exceedingly difficult due to language,
22 technological, and financial barriers, among other obstacles. Nonetheless, since the end of the Title 42
23 policy, CBP has required the majority of migrants to use the app to seek asylum. This requirement has
24 significant legal, privacy, and humanitarian implications for asylum seekers, border communities, and
25 service providers around the country.

1 24. On May 11, 2023, the government terminated its implementation of the Title 42
 2 restrictions that had prevented migrants from seeking asylum at POEs for over three years.

3 25. The evolving situation at the southern border remains the subject of ongoing intense
 4 media and public interest. Scrutiny of CBP conduct at the border is heightened because of the novel
 5 adoption of CBP One for border management. This new pathway for migrants to access the asylum
 6 system has generated both praise and concern, as well as confusion, among the public and asylum
 7 seekers.

8 26. For those lucky enough to be able to understand and utilize the app and to obtain an
 9 appointment through it, CBP One provides a measure of certainty regarding when an individual will be
 10 able to present at a POE and be inspected and processed by CBP. Moreover, asylum seekers who present
 11 at POEs with appointments scheduled via CBP One are exempted from the recently promulgated asylum
 12 ban, enabling them to maintain their eligibility for asylum. *See* Circumvention of Lawful Pathways, 88
 13 Fed. Reg. 31314 (May 11, 2023) (to be codified at 8 C.F.R. §§ 208, 1003, 1208). And, CBP frequently
 14 chooses not to place noncitizens with CBP One appointments in expedited removal proceedings or to
 15 detain them, a significant benefit to migrants with appointments.¹ In contrast, asylum seekers who are
 16 unable to obtain appointments through CBP One must wait indefinitely in Mexico, are routinely turned
 17 back at POEs, and risk losing asylum eligibility under the new rule if they are granted access to POEs or
 18 cross the border between ports. Because CBP’s use of the app has such momentous consequences for
 19 noncitizens fleeing persecution and violence, it is urgent that the public gain a fuller understanding of
 20 how CBP is deploying it.

21 27. Last year, a district court held that the federal government’s “refusal to provide
 22 inspection or asylum processing to noncitizens . . . in the process of arriving in the United States at Class
 23 A Ports of Entry is unlawful” under the Fifth Amendment Due Process Clause. *Al Otro Lado, Inc. v.*
 24 *Mayorkas*, 619 F. Supp. 3d 1029, 1049 (S.D. Cal. 2022). Yet there are numerous recent reports

25 _____
 26 ¹ Muzaffar Chishti and Kathleen Bush-Joseph, Migration Policy Institute, *U.S. Border Asylum Policy*
 27 *Enters New Territory Post-Title 42*, (May 25, 2023), [https://www.migrationpolicy.org/article/border-](https://www.migrationpolicy.org/article/border-after-title-42)
 28 [after-title-42](https://www.migrationpolicy.org/article/border-after-title-42).

1 documenting instances of CBP turning back and refusing to inspect asylum seekers at POEs across the
 2 border because they lacked CBP One appointments.² Similarly, recent reporting has detailed actions by
 3 Mexican government officials, who often appear to be working in coordination with CBP, to prevent
 4 asylum seekers without appointments from reaching U.S. ports of entry.³ Accounts of these practices
 5 include articles in the news media, reports published by national and border-area human rights and legal
 6 service organizations, and first-hand observations by local groups working along the U.S.-Mexico
 7 border.

8 28. The FOIA Request forming the basis for this lawsuit seeks to understand CBP's policies
 9 to manage the flow of migrants without CBP One appointments who approach POEs in order to seek
 10 asylum. The requested information will shed light on CBP's current operations, including how the
 11 agency's embrace of the CBP One mobile app impacts its treatment of asylum seekers. Disclosure of the
 12 requested procedures and data also will contribute to the public's understanding of whether the use of
 13 CBP One is impacting the federal government's compliance with immigration law and the U.S.

14 _____
 15 ² See, e.g., Women's Refugee Commission, *New Asylum Ban Leaves Migrants Stranded* (August 2023),
 16 <https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/New-Asylum-Ban-Leaves-Migrants-Stranded-Recommendations.pdf>; Human Rights First, *Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers* (July 2023),
 17 https://humanrightsfirst.org/wp-content/uploads/2023/07/Refugee-Protection-Travesty_Asylum-Ban-Report_July-2023-1.pdf; Human Rights First, Florence Immigrant & Refugee Rights Project & Kino
 18 Border Initiative, *A Line that Barely Budes: U.S. Limiting Access to Asylum, Nogales, Arizona Port of Entry* (June 2023),
 19 https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budes_Nogales-Arizona.pdf; Kate Morrissey, *U.S. border officials have been turning asylum seekers away at ports of entry despite new rules*, San Diego Union-Tribune, May 20, 2023,
 20 <https://www.sandiegouniontribune.com/news/immigration/story/2023-05-20/border-asylum-seekers-turn-backs-ports>; Daina Beth Solomon & Jose Luis Gonzalez, *Migrants at Mexico border face tight controls after Title 42 lapse*, Reuters, May 16, 2023, <https://www.reuters.com/world/americas/with-barbed-wire-warnings-migrants-stopped-us-mexico-border-2023-05-14/>.

21 ³ National Immigration Project & Together & Free, *Facing an Impossible Choice: Experience of Asylum Seekers in Matamoros and Reynosa Two Months into the Biden Asylum Ban* (July 24, 2023),
 22 https://nipnlg.org/sites/default/files/2023-07/2023_Facing-An-Impossible-Choice.pdf; International Rescue Committee, *Limits on Access to Asylum After Title 42: One Month of Monitoring U.S.-Mexico Border Ports of Entry* (June 23, 2023), <https://www.rescue.org/report/limits-access-asylum-after-title-42-one-month-monitoring-us-mexico-border-ports-entry>; Immigrant Defenders Law Center (@ImmDef), TWITTER (June 6, 2023, 8:24 PM),
 23 <https://twitter.com/immdef/status/1666239640419065856?s=46&t=jxokE-EeyNTn81I7gN7clQ>.

1 Constitution. *See Al Otro Lado*, 619 F. Supp. 3d at 1049 (refusal to “provide inspection or asylum
2 processing” to noncitizens in the process of arriving at POEs “is unlawful regardless of the purported
3 justification for doing so”).

4 29. A clearer understanding of CBP’s policies and practices regarding its novel use of a
5 smartphone app and its collaboration with other governments to control asylum seekers’ access to POEs
6 is critical. Disclosure of the requested information will fulfill the transparency and accountability goals
7 of the FOIA and will aid the public, advocates, and migrants in comprehending how the U.S.
8 government is treating those who seek refuge in this country.

9 ***Plaintiffs’ Request for Information under the FOIA and Defendants’ Failure to Timely Respond.***

10 30. Plaintiffs filed a FOIA request with CBP on July 11, 2023 (the “FOIA Request”). A copy
11 of that request is attached hereto as Exhibit A. *See* Exhibit A.

12 31. Plaintiffs requested records on: a) CBP’s procedures for how to manage undocumented
13 noncitizens approaching the southern border; b) the agency’s use of metering; c) the Office of Field
14 Operations’ (“OFO”) operational and processing capacity at Class A POEs; d) communications with
15 Mexican authorities about noncitizens’ access to POEs and CBP One appointments; and e) data on the
16 number of noncitizens processed at POEs.

17 32. Plaintiffs requested expedited processing of the FOIA request pursuant to 5 U.S.C. §
18 552(a)(6)(E) due to the urgent need to inform the public about the government’s treatment of asylum
19 seekers and the potential violation of their statutory and due process rights. Pursuant to 5 U.S.C. §
20 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k)(1), Plaintiffs also requested a waiver of all fees related to their
21 FOIA Request.

22 33. On July 12, 2023, CBP confirmed receipt of the FOIA Request via email and assigned it
23 tracking number CBP-F0-2023-107085. A copy of the confirmation email is attached hereto as Exhibit
24 B. *See* Exhibit B.

1 34. While the July 12 confirmation from CBP acknowledges that FOIA permits a ten-day
2 extension of the statutory 20-day period to respond to a request, the confirmation does not invoke such
3 extension.

4 35. CBP has not responded to Plaintiffs' request for a fee waiver or for expedited processing.

5 36. CBP has not produced records responsive to Plaintiffs' FOIA Request.

6 37. Defendants failed to provide Plaintiffs with the required response within the times
7 prescribed by the FOIA. *See* 5 U.S.C. § 552(a)(6)(B). Plaintiffs' request remains pending, and CBP has
8 failed to make the legally required determination on the request or produce responsive records.

9 38. Defendants' conduct violates the requirements of the FOIA and deprives Plaintiffs of the
10 opportunity to timely inform the public, including legal and humanitarian service providers, about the
11 federal government's current treatment of asylum seekers arriving at the southern border. This
12 information about practices impacting a highly vulnerable population is particularly important in light of
13 rapidly changing policies and practices at the U.S.-Mexico border. Plaintiffs accordingly seek relief
14 from this Court.

15 **CLAIM FOR RELIEF**

16 **FIRST CAUSE OF ACTION**

17 **Violation of the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i), for**
18 **Failure to Respond within the Time Required**

19 39. The Plaintiffs hereby incorporate, as fully set forth herein, each and every allegation
20 contained in paragraphs 1– 38 above.

21 40. Under the FOIA, CBP was required to respond to the July 11, 2023 request by notifying
22 Plaintiffs of its determination whether to comply with the request within twenty working days after
23 receiving the request. 5 U.S.C. § 552(a)(6)(A).

24 41. Defendants have violated their obligation under the FOIA by failing to make the required
25 determination and to communicate such determination to the Plaintiffs.

1 **SECOND CAUSE OF ACTION**

2 **Violation of the Freedom of Information Act, 5 U.S.C. § 552, for Failure to Conduct a**
3 **Reasonable Search.**

4 42. The Plaintiffs hereby incorporate, as fully set forth herein, each and every allegation
5 contained in paragraphs 1– 38 above.

6 43. Defendants have violated their obligation under the FOIA by failing to make a reasonable
7 effort to search for records responsive to Plaintiffs’ request. 5 U.S.C. § 552(a)(3)(C).

8 **THIRD CAUSE OF ACTION**

9 **Violation of the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), for Failure to Disclose**
10 **Responsive Records**

11 44. The Plaintiffs hereby incorporate, as fully set forth herein, each and every allegation
12 contained in paragraphs 1– 38 above.

13 45. Defendants have failed to produce any records responsive to Plaintiffs’ July 11, 2023
14 FOIA request.

15 46. Defendants are obligated under 5 U.S.C. § 552(a)(3) to promptly produce records
16 responsive to the FOIA request.

17 47. The Plaintiffs have a legal right to obtain such records, and no legal basis exists for
18 Defendants’ failure to disclose them.

19 48. Defendants’ failure to disclose all responsive records violates their statutory obligations
20 to make requested records “promptly available to the public.” 5 U.S.C. § 552(a).

21 **FOURTH CAUSE OF ACTION**

22 **Violation of the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(E)(ii)(I), for Failure to Respond**
23 **to Plaintiffs’ Request for Expedited Processing**

24 49. The Plaintiffs hereby incorporate, as fully set forth herein, each and every allegation
25 contained in paragraphs 1– 38 above.

1 50. Defendants are required to make a determination as to whether to provide expedited
2 processing when it has been requested under 5 U.S.C. §§ 552(a)(6)(E)(ii)(I), (iii).

3 51. Defendants' failure to respond to Plaintiffs' request for expedited processing of their July
4 11, 2023 FOIA request violates their statutory obligations.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, the Plaintiffs respectfully pray for judgment against Defendants as follows:

7 (A) Assume jurisdiction over the matter;

8 (B) Order Defendants to expeditiously conduct an adequate search for all records responsive
9 to the Plaintiffs' FOIA request in accordance with 5 U.S.C. § 552(a)(3)(C);

10 (C) Declare that CBP's failure to timely produce the required determination applicable to
11 Plaintiffs' July 11, 2023 request violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i);

12 (D) Declare that CBP's failure to disclose the records responsive to the Plaintiffs' request
13 violates FOIA, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder;

14 (E) Declare that CBP's failure to respond to Plaintiffs' request for expedited processing
15 violates FOIA, 5 U.S.C. § 552(a)(6)(E)(ii)(I);

16 (F) Order Defendants to process responsive non-exempt records in their entirety, to disclose
17 the requested records in their entirety, and to make the records available to Plaintiffs within twenty (20)
18 days, and enjoin Defendants from improperly withholding records;

19 (G) Award the Plaintiffs reasonable attorneys' fees and other litigation costs pursuant to
20 5 U.S.C. § 552(a)(4)(E); and

21 (H) Grant such other relief as the Court may deem just, equitable, and appropriate.

22 Dated: October 16, 2023

23
24 Respectfully submitted on October 16,
25 2023,

26 /s/ Neela Chakravartula

27 Neela Chakravartula

Melissa Crow*

28 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UC College of the Law, San Francisco
200 McAllister Street
San Francisco, CA 94102
**Pro Hac Vice Motion Forthcoming*

Raul Pinto*
Suchita Mathur*
1331 G St. NW, Ste. 200
Washington, DC 20005
**Pro Hac Vice Motion Forthcoming*

Attorneys for Plaintiffs

Exhibit A



July 11, 2023

Sent via SecureRelease Portal:

U.S. Customs and Border Protection
90 K ST NE MS 1181
Washington, DC 20229

Re: Freedom of Information Act Request for Records Regarding
CBP's Processing of Asylum-Seekers at Southwest Ports of Entry

Dear Freedom of Information Officer:

The American Immigration Council (the "Council") and the Center for Gender and Refugee Studies ("CGRS") submit this request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain information regarding U.S. Customs and Border Protection ("CBP") implementation of new border management measures that require individuals seeking processing at certain southwest ports of entry to apply for an inspection appointment using CBP's smartphone mobile application, CBP One. Requestors seek a fee waiver of any fee imposed by the agency because the records sought will contribute to the public's understanding of CBP operations and release of the information is not in Requestor's commercial interest.

I. REQUEST FOR INFORMATION

Requestors seek records¹ prepared, received, transmitted, collected or maintained by CBP as described below.

1. Records dating from December 2022 until the present relating to guidance, guidelines, procedures, policies or protocols that address how staff from CBP's Office of Field Operations ("OFO") manage undocumented noncitizens who approach Class A ports of entry along the U.S.-Mexico border (hereinafter "Class A POEs") seeking inspection, including but not limited to, individuals who approach ports of entry without a CBP One appointment.
2. Records dating from December 2022 until the present relating to the practice or use of metering noncitizens at Class A POEs.

¹For purposes of the Request, unless otherwise specified, the term "records" includes but is not limited to 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, including text messages, and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations

3. Records related to OFO's operational and/or processing capacity for Class A POEs dating from December 2022 to the present. These records should include, but are not limited to, Queue Management Reports or other records regarding queue management.
4. From February 1, 2023 until the present, records of communications between Mexican government officials, including but not limited to, staff from Mexico's Instituto Nacional de Inmigración ("INM"), Mexican federal police, Mexico's Guardia Nacional or National Guard, Mexican state law enforcement, Mexican officials from Bienestar Social, and other Government of Mexico ("GOM") officials, and any CBP Field Office or OFO staff member about CBP One appointments and undocumented noncitizens' access to Class A POEs.
5. From May 11, 2023 until the present, the following data per month:
 - a. the aggregate number of noncitizens with CBP One appointments processed at each Class A POE broken down by noncitizens' country of citizenship;
 - b. the aggregate number of noncitizens without CBP One appointments processed at each Class A POE broken down by noncitizens' country of citizenship;

II. FORMAT OF PRODUCTION

Requestors seek responsive electronic records in a machine-readable, native file format, with all metadata and load files. We request that any data be provided in a workable format, such as Microsoft Excel or comma-separated values (CSV) files. If terms or codes are not in the form template and/or publicly defined, please provide a glossary or other descriptive records containing definitions of acronyms, numerical codes, or terms contained in data responsive to this request. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. For non-data files, Requestors ask 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.

III. EXPEDITED PROCESSING

Requestors seek expedited treatment for this FOIA request pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e)(1)(iii). As noted below, there is an "urgency to inform the public concerning the actual or alleged Federal Government activity," 5 U.S.C. § 552(a)(6)(E)(v)(II), and a federal court has determined that preventing asylum seekers from accessing inspection and processing at POEs violates their "due process rights," 6 C.F.R. § 5.5(e)(1)(iii). *See Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1049 (S.D. Cal. 2022). There is an urgent need to inform the public, asylum seekers, and legal and humanitarian service providers about the records subject to this request, as they would shed light on the federal government's current treatment of asylum seekers, many of whom are highly vulnerable individuals and families, in light of rapidly changing policies, practices, and conditions at the U.S.-Mexico border.

The ability of asylum seekers to access ports of entry along the southwest border is an issue of urgent humanitarian importance that implicates their constitutional rights. Since 2016, individuals seeking protection in the United States who approach POEs have faced a variety of obstacles to accessing the asylum system. These include CBP's policy and practice of metering individuals; the global COVID-19 pandemic and implementation of the Title 42 policy; and the recently promulgated Circumvention of

Lawful Pathways regulation.² Last year, a federal judge held that the federal government’s “refusal to provide inspection or asylum processing to noncitizens . . . in the process of arriving in the United States at Class A Ports of Entry is unlawful” under the Fifth Amendment Due Process Clause. *Al Otro Lado, Inc.*, 619 F. Supp. 3d at 1049. In light of CBP’s resumption of processing of noncitizens under Title 8 of the Immigration and Nationality Act, it is crucial to understand whether the government’s current treatment of asylum seekers complies with the U.S. Constitution and federal immigration law. Because there are recent reports documenting instances of CBP illegally turning back asylum seekers from POEs,³ the subject matter of this request – which could substantiate the U.S. government’s policy of preventing access to POEs -- involves the “loss of substantial due process rights.” 6 C.F.R. § 5.5(e)(1)(iii).

Individuals from around the world continue to look to the United States for refuge in the face of violence, persecution, and political, economic, and environmental crises. But the conditions asylum seekers face in northern Mexico while waiting for the opportunity to access asylum are dire. They include widespread violence, lack of access to shelter and medical services, and extreme economic deprivation.⁴ As a result of these circumstances, thousands of asylum seekers at or near the U.S.-Mexico border and organizations that provide services for them are urgently in need of concrete information about how CBP is managing the inspection and processing of migrants.⁵

Moreover, the situation at the U.S.-Mexico border is currently a subject of ongoing intense media and public interest due to lifting of Title 42-related restrictions in May 2023 and expectations that the U.S. government would resume processing of asylum seekers. The media and public scrutiny of government conduct at the border is heightened because of the novel requirement that most asylum seekers use CBP One to make appointments at POEs. This new pathway to accessing the asylum system has generated significant public interest and confusion about how use of the app impacts migrants.⁶ Because CBP’s use of the app has such momentous consequences for noncitizens fleeing persecution and violence, it is urgent that the public gain a fuller understanding of how the government is deploying it.

We hereby certify that the foregoing is true and correct to the best of our knowledge and belief.

² See, e.g., Stephanie Leutert and Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: May 2023*, The University of Texas at Austin Strauss Center for International Security and Law, May 2023, https://www.strausscenter.org/wp-content/uploads/May_2023_Asylum_Processing.pdf

³ See, e.g., *id.*; *Limits on Access to Asylum After Title 42: One Month of Monitoring U.S.-Mexico Border Ports of Entry* (International Rescue Committee), June 23, 2023, <https://www.rescue.org/report/limits-access-asylum-after-title-42-one-month-monitoring-us-mexico-border-ports-entry>

⁴ See, e.g., *Lives at Risk: Barriers and Harms as Biden Asylum Ban Takes Effect*, *Hum. Rts. Rep.* (Amnesty Int’l, New York, NY), May 18, 2023, <https://www.amnestyusa.org/wp-content/uploads/2023/05/Lives-at-Risk-Barriers-and-Harms-As-Biden-Asylum-Ban-Takes-Effect.pdf>; Stef W. Knight, *What the U.S. doesn’t see*, *Axios*, May 26, 2023, <https://www.axios.com/2023/05/26/border-mexico-us-immigration-policy>.

⁵ See, e.g., Camilo Montoya-Galvez, *Title 42 ends with 60,000 migrants waiting near U.S.-Mexico border*, *CBS News*, May 12, 2023, <https://www.cbsnews.com/news/title-42-expiration-60000-migrants-us-mexico-border-patrol-raul-ortiz/>; Uriel J. Garcia, *Migrants waiting to cross the border say government’s app for asylum-seekers is a mess*, *The Texas Tribune*, May 9, 2023, <https://www.texastribune.org/2023/05/09/texas-border-title-42-migrants-phone-app/>.

⁶ See, e.g., Sanya Mansoor, *Extreme Asylum Claims Aren’t Prioritized in New U.S. Government App*, *TIME*, May 25, 2023, <https://time.com/6282428/asylum-claims-government-app-violence-migrants/>; John Salazar, *Asylum seekers impatient with CBP One app*, *Spectrum News 1*, June 7, 2023, <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2023/06/07/asylum-seekers-impatient-with-cbp-one-app>.

IV. FEE WAIVER REQUEST

Requestors seek a fee waiver 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 requestor.” 5 U.S.C. § 552(a)(4)(A)(iii).

1. *Disclosure of the Information Is in the Public Interest*

The public interest criteria is satisfied when (1) the request concerns operations or activities of the government; (2) disclosure is likely to contribute to an understanding of government operations or activities; (3) disclosure contributes to an understanding of the subject by the public at large; and (4) disclosure is likely to contribute significantly to such understanding.⁷

CBP is the component within the U.S. Department of Homeland Security (“DHS”) with authority to inspect and process asylum seekers. The agency’s recent deployment of CBP One, a mobile application for smartphones, to allow noncitizens to directly make appointments for inspection at ports of entry along the U.S.-Mexico border is unprecedented. CBP’s requirement that migrants use CBP One has significant legal, privacy, and humanitarian implications for migrants, border communities, and service providers around the country. Unsurprisingly, the app and its consequences have generated widespread public interest and concern, including among elected officials seeking additional information about its impact.⁸

This request is in the public interest because it meets all the necessary criteria. First, Requestors seek information that concerns CBP’s operations; in particular, requestors seek information about how the agency manages the flow of migrants without CBP One appointments who approach POEs in order to seek asylum. The requested information will shed light on CBP’s current operations, including how the agency’s embrace of CBP One has impacted the agency’s treatment of asylum seekers at the U.S.-Mexico border.

Second, disclosure of the requested procedures and data will contribute to the public’s and Requestors’ understanding of whether CBP’s use of CBP One is impacting the federal government’s compliance with immigration law and the U.S. Constitution. *See Al Otro Lado, Inc.*, 619 F. Supp. 3d at 1049 (refusal to “provide inspection or asylum processing” to noncitizens in the process of arriving at POEs “is unlawful regardless of the purported justification for doing so”). A clear picture of CBP’s protocols for inspecting and processing noncitizens without CBP One appointments, and the resulting data regarding the numbers of migrants processed at each POE, is also crucial for public understanding of whether the government’s deployment

⁷ 6 C.F.R. § 5.11(k)(2) (2017) (DHS regulations outlining criteria for responses to requests for fee waivers under FOIA); see also *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing 28 C.F.R. § 16.11(k)(2)).

⁸ See, e.g., Press Release, *Booker Expresses Concerns over CBP Mobile Application for Asylum Seekers*, U.S. Senator Cory Booker, March 28, 2023, <https://www.booker.senate.gov/news/press/booker-expresses-concerns-over-cbp-mobile-application-for-asylum-seekers>; *Glitches plague CBP One app for asylum-seekers as Title 42 comes to an end*, PBS News, Apr. 22, 2023, <https://www.pbs.org/newshour/show/glitches-plague-cbp-one-app-for-asylum-seekers-as-title-42-comes-to-an-end>

of CBP One has been effective and fair.⁹

Finally, the agency's disclosure of these records to Requestors will significantly contribute to the public's understanding of how CBP One is impacting the government's treatment of asylum seekers. The novel use of the app, its evolving capabilities and features, and constantly changing policies and practices at the U.S.-Mexico border have generated confusion and concerns regarding access to the asylum system at ports of entry.¹⁰

Both the Council and CGRS are non-partisan organizations that have experience in disseminating information related to immigration in the United States, including information obtained through the FOIA. The Council, a non-profit organization, regularly provides information, including fact sheets, reports and other publications to the public based on its FOIA requests.¹¹ This information reaches a wide audience, which includes varied segments of the U.S. public. This information reaches a wide audience, which includes varied segments of the U.S. public. The Council intends to provide information received in response to this FOIA request on its publicly accessible website. In 2022, the Council received more than 2.6 million pageviews from more than 1.6 million visitors. The Council also regularly shares information with national print and news media and plans to distribute information obtained from these FOIA disclosures to interested media. In keeping with its track record of synthesizing or otherwise publishing information on governmental operations shared in responses to FOIA requests, the Council intends to provide information received in response to this FOIA request on its publicly accessible website.

⁹ See, e.g., Salvador Rivera, *Number of asylum seekers waiting to cross border doubles as San Ysidro Port of Entry*, Border Report, June 2, 2023, <https://www.borderreport.com/news/number-of-asylum-seekers-waiting-to-cross-border-doubles-at-san-ysidro-port-of-entry/> (reporting large increases in the number of asylum seekers waiting to cross the border without CBP One appointments); Camilo Montoya-Galvez, *CBP One app becomes main portal to U.S. asylum system under Biden border strategy*, CBP News, Apr. 11, 2023, <https://www.cbsnews.com/news/cbp-one-app-us-border-asylum-biden/> (noting statements that CBP One "is like reducing asylum to Ticketmaster").

¹⁰ See, e.g., Richard Allyn, *Migrants at border frustrated with CBP One app despite update*, CBS 8, May 12, 2023, <https://www.cbs8.com/article/news/investigations/beyond-the-border/migrants-at-border-frustrated-with-cbp-one-app/509-1f910230-e42c-4a92-8c80-6c5bc288b3e6>; Press Release, *Senator Markey Calls on DHS to Ditch Mobile App Riddled with Glitches, Privacy Problems, for Asylum Seekers*, U.S. Senator Edward J. Markey, Feb. 21, 2023, <https://www.markey.senate.gov/news/press-releases/senator-markey-calls-on-dhs-to-ditch-mobile-app-riddled-with-glitches-privacy-problems-for-asylum-seekers>.

¹¹ See, e.g., American Immigration Council, "Government Documents Reveal Information about the Development of the CBP One App," (Feb. 28, 2023), <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app>; American Immigration Council, "The Electronic Nationality Verification Program: An Overview," (Jan. 26, 2021), <https://www.americanimmigrationcouncil.org/research/electronic-nationality-verification-program-overview>; Guillermo Cantor *et al.*, "Changing Patterns of Interior Immigration Enforcement in the United States," 2016 -2018, American Immigration Council (July 1, 2019), <https://americanimmigrationcouncil.org/research/interior-immigration-enforcement-united-states-2016-2018>; American Immigration Council, "Stays of Removal Responses from EOIR" (May 2019), https://americanimmigrationcouncil.org/sites/default/files/foia_documents/board_of_immigration_appeals_interpretation_of_stay_of_removal_foia_production.pdf; Guillermo Cantor & Walter Ewing, "Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered, American Immigration Council" (Aug. 2017), http://bit.ly/Council_StillNoActionTaken.

CGRS, which is based at the University of California College of the Law, San Francisco, provides technical assistance and publishes reports, policy analysis, and other educational materials that are widely disseminated, including through its website. Some materials are fully available to the public, and some are made available free of charge to registered users—including members of tax-exempt organizations, non-profit groups, lawyers, academics, law students, refugees, and asylum seekers. CGRS also publishes an electronic newsletter distributed to subscribers via email, regularly conducts nation-wide trainings and webinars, and releases information via social media platforms such as Twitter and Facebook.

Requestors' demonstrated ability to effectively convey and disseminate information requested will contribute to the public's understanding of CBP's treatment of asylum seekers at the U.S.-Mexico border, an issue of considerable public interest. Further, Requestors' commitment to share this information widely and free of charge among their networks of supporters and anyone who accesses their websites ensures that disclosure is likely to significantly contribute to the public's understanding of the issue.

Thus, the request for information meets the public interest element for the fee waiver request rule.

2. *Disclosure of the information is not in Requestors' Commercial Interest.*

Requestors have no commercial interest in the records requested, and this request aims at furthering public understanding of government conduct: specifically, as described above, the urgent need for the public to understand how Customs and Border Protection is operating as to its treatment of asylum seekers at the U.S.-Mexico border.

The Council, as a not-for-profit organization, has no commercial interest in the present request. 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, as well as information frequently disseminated to the public via electronic newsletters, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, policymakers, and other interested members of the public free of charge.

CGRS plans to make disclosures obtained through this request available to its audience, which includes members of other tax-exempt organizations, non-profit groups, refugees, asylum seekers and other migrants, lawyers, academics, and law students, free of charge. As an educational institution and not-for-profit organization, CGRS has no commercial interest in the present request.

As FOIA's fee-waiver requirements must be liberally construed in favor of waivers for noncommercial requestors, a waiver of all fees is justified and warranted in this case.

Thank you for your attention to this request. If you have any questions regarding this request, please do not hesitate to contact me.

Very truly yours,

_____/s/ Raul A. Pinto
Raul A. Pinto, Senior Staff Attorney
American Immigration Council
Tel. 202-507-7549
Email rpinto@immcouncil.org

_____/s/ Melissa Crow
Melissa Crow, Director of Litigation
Center for Gender and Refugee Studies
Tel. 202-355-4471
Email crowmelissa@uchastings.edu

on behalf of Requestors

Exhibit B

Raul Pinto

From: cbpfoia@cbp.dhs.gov <noreply@securerelease.us>
Sent: Wednesday, July 12, 2023 1:29 PM
To: Raul Pinto
Subject: CBP FOIA - CBP-FO-2023-107085

Raul Pinto
American Immigration Council
1331 G Street NW
Suite 200
Washington, District of Columbia 20005

07/12/2023

CBP-FO-2023-107085

Dear Raul Pinto:

This notice acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP) received on 7/11/2023. Please use the following unique FOIA tracking number CBP-FO-2023-107085 to track the status of your request. If you have not already done so, you must create a SecureRelease account. This is the only method available to check the status of your pending FOIA request.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS FOIA regulations outlined on the DHS website, <https://www.federalregister.gov/documents/2016/11/22/2016-28095/freedom-of-information-act-regulations>. By submitting your request, you have agreed to pay up to \$25.00 in applicable processing fees, if any fees associated with your request exceed this amount, CBP shall contact you.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Consistent with 6 C.F.R. Part 5 § 5.5(a) of the DHS FOIA regulations, CBP processes FOIA requests according to their order of receipt. Although CBP's goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 § 5.5(c).

CBP's FOIA Division is working hard to reduce the amount of time necessary to respond to FOIA requests. We truly appreciate your continued patience.

For additional information please consult CBP FOIA website please click on FOIA Act Resources or visit <http://www.cbp.gov/site-policy-notice/foia>.

Sincerely,

U.S. Customs and Border Protection

This message (including any attachments) contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this message and any disclosure, copying, or distribution of this message, or the taking of any action based on it, by you is strictly prohibited.

Deloitte refers to a Deloitte member firm, one of its related entities, or Deloitte Touche Tohmatsu Limited ("DTTL"). Each Deloitte member firm is a separate legal entity and a member of DTTL. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

v.E.1