

FAMILIES FOR FREEDOM; JANE DOE;
MARY DOE; and JOHN DOE,

Plaintiffs,

V.

UNITED STATES CUSTOMS AND
BORDER PROTECTION;

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT; and

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

Civil Action No. 10 CV 2705 (SAS)

FIRST AMENDED COMPLAINT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action seeks to compel disclosure of agency records improperly withheld or redacted under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., by United States Customs and Border Protection (“CBP”), United States Immigration and Customs Enforcement (“ICE”), and the United States Department of Homeland Security (“DHS”).

2. Plaintiffs seek to procure government records of significant public concern, namely, records related to the scope and practices of CBP operations in the Buffalo Sector in which Border Patrol officers improperly engage in interior enforcement of immigration laws by questioning bus and train travelers about their immigration status on inter-city conveyances that never cross the border (hereinafter “transportation raids”).

3. Apprehensions have dramatically increased in recent years in the Buffalo Border Patrol Sector, which spans twenty-nine counties in New York and Pennsylvania. Upon information and belief, transportation raids are driving the growth in arrests. These raids have caused widespread concern in the community, as demonstrated by protests, vigils, and significant media attention surrounding the issue. See Tim Martinez, Newhouse School of Public Communications, Syracuse University, *Caught in Transit: The Rochester Border Patrol Station*, Newhouse School of Public Communications, Syracuse University, <http://cmr.syr.edu/newshouse/video/article.html> (last visited March 8, 2010) (featuring a video documenting Rochester Border Patrol's transportation raids); see also Emily Bazar, *Border Patrol Expands Transportation Checks*, USA Today, Oct. 1, 2008, available at http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks_N.htm; Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Oct. 2, 2008, available at http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm; Nadja Drost, *Border Net Catches Few Terror Suspects*, Times Union, Apr. 19, 2009, available at <http://www.timesunion.com/AspStories/story.asp?storyID=791561>; Darryl McGrath, *Strangers on a Train*, Metroland, July 27, 2006, available at http://www.metroland.net/back_issues/vol29_no30/features.html; John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Syracuse City News, July 5, 2008, available at <http://www.syracuse.com/city/index.ssf/2008/06/29-week/>.

4. The Plaintiffs' FOIA requests seek information that would document the illegality of transportation raids. Plaintiffs believe that these raids occur outside the bounds of Border Patrol's statutory and regulatory authority and violate the Fourth Amendment in an egregious and widespread manner because they are conducted without particularized suspicion and frequently involve racial profiling. Evidence of these constitutional, statutory, and regulatory violations is not

only relevant to the public in assessing the value of transportation raids; it is also directly relevant to pending deportation proceedings—including the proceedings of Jane Doe, Mary Doe, and John Doe—where evidentiary support is necessary to prevail on motions to terminate proceedings and suppress evidence obtained through these unlawful operations. *See Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).

5. Upon information and belief, Border Patrol continues to engage in these interior transportation raids within the Buffalo Sector. These interior checks generally involve armed Border Patrol agents boarding domestic Amtrak trains and domestic inter-city buses, such as Greyhound buses, without any judicial warrants and without reasonable suspicion of unlawful entry. These checks do not occur at permanent checkpoints or at the functional equivalent of the border; rather, they are roving patrols that require reasonable suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Once on board, agents question the confined passengers in an authoritative and demanding manner about their citizenship status. When Border Patrol agents encounter a non-citizen, they try to extract incriminating information that can be used against the immigrant in deportation proceedings. Upon information and belief, the agents frequently conduct questioning in a discriminatory manner by either picking and choosing passengers to question on the improper basis of race or by probing passengers of color more carefully during questioning than other passengers. *See* Kirk Semple, *Racist Web Posts Traced to Homeland Security*, N.Y. Times, July 24, 2009, *available at* <http://www.nytimes.com/2009/07/25/nyregion/25immig.html> (reporting that racist online comments posted in response to a Wayne County Star article about Border Patrol's arrest of Hispanic immigrants were traced back to web addresses at the Department of Homeland Security, likely at Border Patrol itself). When passengers are removed from the train or bus, CBP

usually detains the traveler and frequently transfers them to far-flung detention facilities, such as in Texas.

6. Border Patrol's unlawful transportation raids have had a chilling effect on the ability of United States citizens of color, authorized visitors and immigrants such as foreign students, and undocumented immigrants who wish to travel on domestic transports through the upstate New York area. These raids have sparked fear and concern throughout these communities. In 2008, Families for Freedom organized protests at Penn Station and Port Authority in Manhattan condemning the transportation raids. See Jennifer Lee, *A Protest Over Bus and Train Citizenship Checks*, N.Y. Times (City Room), Apr. 2, 2008, <http://cityroom.blogs.nytimes.com/2008/04/02/a-protest-over-bus-and-train-citizenship-checks/>. Other demonstrations have occurred in upstate New York in recent years calling on Amtrak and Greyhound to stop enabling the raids.

7. Despite the significant effect these transportation raids have had on communities of minorities and immigrants, there is a dearth of public information about the scope of these activities and the policies behind them beyond what is reported in the press. More information is needed for the American public to understand the practical and legal implications of these activities. In addition, this information is urgently needed by immigrants placed in removal proceedings through Border Patrol's unlawful and unconstitutional activities who are challenging the validity of their proceedings and the admissibility of adverse evidence collected during the course of these activities. Evidence of constitutional violations is critical for immigrants to prevail on their motions to suppress because only widespread or egregious violations of the Fourth Amendment support suppression in immigration court. See *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).

JURISDICTION AND VENUE

8. This Court has both subject matter jurisdiction over this action and personal jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

9. Venue lies in this district pursuant to 5 U.S.C. 552(a)(4)(B), 28 U.S.C. §§ 1391(e) and 1402(a).

PARTIES

10. Plaintiff Families for Freedom is a New York-based multi-ethnic defense network by and for immigrants facing deportation. Its office and principal place of business is located at 3 West 29th Street, Suite 1030, New York, New York 10001. Founded in September 2002, Families for Freedom is a membership-based organization with approximately 100 members, made up of immigrants who are in or have been in immigration removal proceedings, their families and loved ones, and individuals at risk of deportation. Families for Freedom is a 501(c)(3) non-profit organization. Families for Freedom's mission is to educate and organize families and communities affected by deportation. It uses community education and mobilization, legal advocacy, and media work to forge collective campaigns and build support and awareness of the issues facing immigrant communities. Families for Freedom joined the first FOIA request to CBP and signed onto the second set of FOIA requests to CBP, ICE, and DHS.

11. Plaintiff Jane Doe is an individual who was arrested in one of the transportation raids that is the subject of the instant FOIA requests. Border Patrol agents boarded Jane Doe's Amtrak train, the Lake Shore Limited departing from Chicago, and questioned passengers in both Erie, Pennsylvania and Rochester, New York. The Border Patrol agents, upon information and belief, lacked reasonable suspicion to question Jane Doe and instead targeted her on the basis of her race.

The agents proceeded to engage in non-consensual questioning of Jane Doe aboard the train and eventually arrested her. Jane Doe was detained for nearly four weeks, first in upstate New York, and later in Texas. When she was released from her Texas detention facility, she was forced to find her own way back to New York. Jane Doe is now in removal proceedings. She has moved to terminate the proceedings, or in the alternative, suppress the evidence against her as fruit of Border Patrol's unlawful operations and unconstitutional conduct. She requires access to information sought in the instant FOIA requests to prove that Border Patrol's operations routinely exceed its statutory and regulatory mandates and constitute widespread or egregious violations of the Fourth Amendment. Jane Doe filed the first FOIA request to CBP through her counsel shortly after securing representation for her immigration proceedings. She also signed onto the second set of FOIA requests to CBP, ICE, and DHS. She needs this information, as the motions are pending. Jane Doe resides in Nassau County, New York and has chosen to use a pseudonym because she fears retaliation for asserting her rights under the Freedom of Information Act.

12. Plaintiff Mary Doe is an individual who was arrested in one of the transportation raids that is the subject of the instant FOIA requests. Border Patrol agents boarded Mary Doe's Greyhound bus in Rochester, New York and questioned her and her companion, John Doe. The Border Patrol agents, upon information and belief, lacked reasonable suspicion to question Mary Doe and instead targeted her on the basis of her race. The agents proceeded to engage in authoritative questioning of Mary Doe and eventually arrested her. Mary Doe was detained for about two weeks at a county jail in upstate New York. Mary Doe is now in removal proceedings. She requires access to information sought in the instant FOIA requests to prove that Border Patrol's operations routinely exceed its statutory and regulatory mandates and constitute widespread or egregious violations of the Fourth Amendment. Mary Doe signed onto the second set of FOIA

requests to CBP, ICE, and DHS. She needs this information, as her immigration proceedings are pending. Mary Doe resides in Queens County, New York and has chosen to use a pseudonym because she fears retaliation for asserting her rights under the Freedom of Information Act.

13. Plaintiff John Doe is an individual who was arrested in one of the transportation raids that is the subject of the instant FOIA requests. Border Patrol agents boarded John Doe's Greyhound bus in Rochester, New York and questioned him and his companion, Mary Doe. The Border Patrol agents, upon information and belief, lacked reasonable suspicion to question John Doe and instead targeted him on the basis of his race. The agents proceeded to engage in authoritative questioning of John Doe and eventually arrested him. John Doe was detained for about three weeks at a county jail in upstate New York. John Doe is now in removal proceedings. He requires access to information sought in the instant FOIA requests to prove that Border Patrol's operations routinely exceed its statutory and regulatory mandates and constitute widespread or egregious violations of the Fourth Amendment. John Doe signed onto the second set of FOIA requests to CBP, ICE, and DHS. He needs this information, as his immigration proceedings are pending. John Doe resides in Queens County, New York and has chosen to use a pseudonym because he fears retaliation for asserting his rights under the Freedom of Information Act.

14. Defendant United States Customs and Border Protection is a department of the United States Department of Homeland Security. It is the umbrella agency for the U.S. Border Patrol, which is primarily responsible for securing the border against illegal cross-border traffic.

15. Defendant United States Immigration and Customs Enforcement is a department of the United States Department of Homeland Security that enforces immigration and customs laws.

16. Defendant United States Department of Homeland Security is the umbrella agency for the United States Customs and Border Protection and Immigration and Customs Enforcement.

STATEMENT OF FACTS

Border Patrol's Transportation Raids

17. In 2003, CBP was reorganized and made a division of the newly created Department of Homeland Security. CBP is charged with securing the nation's borders. Immigration and Customs Enforcement—also a newly created division of DHS as of 2003—is charged with enforcing customs and immigration laws.

18. In 2004, CBP and ICE entered into a Memorandum of Agreement that reflects the distinct nature of the two agencies' missions. The agreement states, "Primarily, the Border Patrol's enforcement responsibilities that extend well within the United States are directed at interdicting or disrupting illegal cross-border traffic while still in transit."

19. The Buffalo Sector of the Border Patrol spans twenty-nine counties in New York and Pennsylvania. Its only international border is a water boundary primarily formed by Lake Erie and Lake Ontario.

20. The Rochester Station—an office within the Buffalo Sector region that is of central concern to the FOIA requests at issue—was opened in 2004 as a maritime patrol station coinciding with the launching of a ferry service between Rochester and Toronto, Canada. By January 2006, the ferry service had closed permanently, yet the Rochester station remained open. Upon information and belief, the Rochester Station then shifted its manpower and attention to interior enforcement, checking domestic travelers' immigration status on trains, buses, and at transportation stations. Upon information and belief, the number of Border Patrol agents at Rochester Station nearly quadrupled between May 2008 and late 2009.

21. Based on media and individual accounts, during a typical transportation raid, Border Patrol agents board the stopped conveyance and question the confined passengers in a non-consensual manner about their citizenship status without a judicial warrant and in the absence of reasonable suspicion. Upon information and belief, the agents frequently conduct questioning in a discriminatory manner, either by selecting passengers to question based on race or by probing passengers of color more closely. When Border Patrol agents encounter a non-citizen, the agents try to extract incriminating information, which can be used against the immigrant in deportation proceedings.

22. Congress has pressured Border Patrol to produce apprehensions and increase its manpower along the northern border. According to 2003 testimony before Congress, only 567 Border Patrol agents were assigned to the northern border, compared to 9,500 on the southern border. The manpower on the northern border constituted a mere six percent of total Border Patrol agents. In 2004, Congress passed legislation to increase staffing along the northern border, aiming to place twenty percent of new recruits on the northern border. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 5202, 118 Stat. 3638, 3734 (2004).

23. Between 2001 and 2005, the Buffalo Sector, like the rest of the northern border, experienced a drop in apprehensions (from 1,434 to 400 in the Buffalo Sector; from about 11,500 to about 7,200 along the northern border). Transactional Records Access Clearinghouse, Controlling the Borders (2006), *available at* <http://trac.syr.edu/immigration/reports/141/>; Congressional Research Service, Border Security: The Role of the U.S. Border Patrol 21, 24 (2008), *available at* <http://trac.syr.edu/immigration/library/P3086.pdf>.

24. Between 2005 and 2008, Buffalo Sector experienced a conspicuously rapid growth in apprehensions. During that period, Buffalo saw an *eight-fold* increase in apprehensions (from 400

to 3,339), compared to a mere eleven percent increase for the northern border as a whole (from about 7,200 to just below 8,000). The 2006 to 2008 Buffalo Sector statistics were only made known to Plaintiffs and effectively the public through CBP's limited FOIA response to the first request at issue here. This FOIA request has already yielded data of significant public importance and Plaintiffs expect that disclosure of additional records and data will reveal even more valuable information.

25. Upon information and belief, transportation raids—which began around 2006 in the Buffalo Sector—significantly bolstered the Buffalo Sector's apprehension statistics and account for a large portion of the dramatic increase between 2005 and 2008. Upon information and belief, over half of the Buffalo Sector's arrests between 2007 and 2008 occurred on domestic trains and buses or at train and bus stations.

26. Plaintiffs believe that the Buffalo Sector's astonishing growth in apprehensions may be explained by pressures to produce arrests, which often cause undue focus on non-priority immigrants under the pretext of targeted enforcement. Plaintiffs are aware of a similar phenomenon occurring in the context of home raids conducted by ICE. There, fugitive operations teams entered homes without judicial warrants in order to search for a particular fugitive who is within one of their enforcement priority categories (e.g. immigrants with old orders of deportation). Once inside a home under the pretext of searching for the individual fugitive, ICE officers would question anyone in or near the target residence who appeared to be a non-citizen. Data suggests that these "collateral" arrests during home raids became prevalent after policy changes in 2006 increased arrest quotas and eliminated the requirement that seventy-five percent of countable arrests be of criminal aliens. These policy changes effectively required fugitive operations teams to become eight times more efficient overnight, setting the stage for collateral arrests as a convenient means of

reaching the new, inflated quota. This phenomenon was brought to light after FOIA litigation produced valuable data (such as the I-213 arrest forms also sought in the instant requests), which became the basis for a groundbreaking report on the issue and sparked significant media interest, including an article in the New York Times. *See* Cardozo Immigrant Justice Clinic, *Constitution on ICE: A Report on Immigration Home Raid Operations* (2009) 23-24, *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf; Nina Bernstein, *Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. Times, July 21, 2009, *available at* http://www.nytimes.com/2009/07/22/nyregion/22raids.html?_r=1&partner=rss&emc=rss. The information sought in the FOIA requests at issue in this complaint will help Plaintiffs discern whether Border Patrol is similarly engaged in unwise, unlawful and unconstitutional behavior. For instance, the I-213 arrest forms contain fields for “Length of Time Illegally in U.S.,” complexion, country of citizenship, and criminal history. This information will be helpful in determining whether Border Patrol’s transportation raids are identifying long-time residents or recent border-crossers, whether they are identifying priority targets, and whether race is playing a role in questioning. Plaintiffs have also requested information concerning quotas or arrest goals, which will illuminate whether pressure exists for Border Patrol agents to bend the rules in order to produce arrests in the same way as ICE agents in the home raid context. In essence, the FOIA requests at issue here will likely elucidate data and records that will prove valuable for determining whether transportation raids implicate serious constitutional, statutory, and policy concerns.

27. CBP has not made statistics publicly available to determine whether increased apprehensions are of border-crossers or whether, as many suspect, these apprehensions are of long-time residents. Nor has CBP released information on quotas or other standards that would tend to

suggest that agents are pressured to engage in non-consensual questioning or pressured to use race as a convenient outward sign of citizenship status.

28. Upon information and belief, CBP continues to regularly conduct transportation raids in New York and throughout the United States.

The First Request for Information

29. On February 26, 2009, a Freedom of Information Act request was sent to CBP pursuant to 5 U.S.C. § 552 requesting the production of records that would be valuable in the representation of Jane Doe in immigration court (referred to throughout as the “first FOIA request”). The request solicited the following: (1) I-213 arrest forms for persons apprehended on Amtrak trains by officers out of the Rochester Border Patrol Station from 2003 to 2008, (2) arrest statistics for same, broken down by length of time the immigrant was in the United States, (3) total arrest statistics for the Rochester Station from 2003 to 2008, (4) explanations and listings of certain codes on the arrest forms, (5) arrest quotas, targets or goals for Border Patrol officers operating in the Buffalo Sector and at the Rochester Station for 2003 to 2008, (6) performance review standards for Border Patrol officers operating in the Buffalo Sector and at the Rochester Station for 2003 to 2008, (7) training materials on racial profiling, (8) training materials on Amtrak enforcement operations, (9) reports concerning Amtrak arrests from 2003 to 2008, (10) agreements between Border Patrol and Amtrak, and (11) standards of conduct for CBP officers at the border and in the interior. A copy of this request is attached as Exhibit “A.”

30. The FOIA request also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) because there was a compelling and immediate need for the information. Counsel sought these records to produce them as evidence in Jane Doe’s immigration case in support of her

contention that Border Patrol's transportation raids are beyond the scope of its authority and violated her constitutional rights.

31. Counsel requested a fee waiver on any charges exceeding \$100.00 pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k) because the information sought "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."

32. Plaintiffs have no commercial interest in this matter. They will make any information obtained as the result of these FOIA requests available to the public, including the press, at no fee. Plaintiffs therefore meet the statutory requirements for a fee waiver.

33. Plaintiffs are aware of at least two other immigration court proceedings that involve respondents identified by Border Patrol through transportation raids who would benefit from the information sought in the instant FOIA requests. Plaintiffs will make any information obtained through these FOIA requests available to those respondents for use in their immigration court cases.

34. By letter dated April 9, 2009, Mark Hanson, Director of the FOIA Division for CBP, acknowledged receipt of the FOIA request. He indicated that the agency was unable to initiate the search for responsive records until Counsel had provided a statement from an individual certifying that she agrees to release records to a third party, namely Counsel, even though the request did not ask for records pertaining to any particular individual. Mr. Hanson indicated that the agency would assume Counsel was no longer interested in the request if Counsel did not respond within ten days. In that letter, Mr. Hanson also clarified that the request pertained to Border Patrol Agents rather than Customs and Border Protection Officers and indicated that there is no agreement between CBP and Amtrak in response to one of the requested items. A copy of this letter is attached as Exhibit "B."

35. In that same letter dated April 9, 2009, Mr. Hanson stated that due to an increasing number of FOIA requests, the agency may encounter delay in processing the request. He then noted that CBP processes FOIA requests according to their order of receipt pursuant to 6 C.F.R. § 5.5(a), without addressing Counsel's request for expedited processing.

36. By letter dated April 17, 2009, Counsel asserted that an individual certification was unnecessary since the arrest forms were requested in redacted form to remove identifying information. Counsel renewed its request that the FOIA request be processed expeditiously. A copy of this letter is attached as Exhibit "C."

37. By letter dated June 2, 2009, Mr. Hanson again asserted the need for an individual certification before initiating the search for records pursuant to 6 C.F.R. § 5.21(f). A copy of this letter is attached as Exhibit "D."

38. By letter dated June 9, 2009, Counsel again replied that an individual certification was inappropriate in light of the nature of the FOIA request. A copy of this letter is attached as Exhibit "E."

39. By letter dated June 16, 2009, Counsel informed CBP that Families for Freedom was joining the original FOIA request. A copy of this letter is attached as Exhibit "F."

40. By letter dated July 22, 2009, Mr. Hanson issued the final response of the agency. The agency stated that it had identified 81 pages of responsive documents, 50 of which were withheld in their entirety pursuant to 5 U.S.C. § 552(b)(2) (low) (hereinafter "Exemption 2 low"), § 552(b)(2) (high) (hereinafter "Exemption 2 high"), § 552(b)(5) (hereinafter "Exemption 5"), § 552(b)(6) (hereinafter "Exemption 6"), § 552(b)(7)(C) (hereinafter "Exemption 7(C)"), and § 552(b)(7)(E) (hereinafter "Exemption 7(E)"). The agency also claimed that it had a document from the Department of Homeland Security and the Department of Justice which it was prohibited from

releasing, but which it was forwarding to those agencies for review and direct response. Fifteen pages were released, with certain information within these pages withheld pursuant to Exemptions 2 low, 2 high, 6, 7(C), and 7(E). These 15 pages included: a copy of the Supreme Court case, *U.S. v. Drayton*, 536 U.S. 194 (2002), a memorandum dated August 25, 2004 entitled "Implementing Secretary's Policy on the Use of Race or Ethnicity in Law Enforcement Activities," a memorandum dated February 2, 2005 entitled "Race and Neutrality in Law Enforcement," and a three-page document in which the first words are "Buffalo Sector Apps for FY 2003-FY 2008" that demonstrates the number of arrests for the five year period but has most of the other identifying information redacted (including the method of apprehension, the total officer hours spent on enforcement, the employment status of individuals apprehended, and the number of individuals found in travel). This last document is numbered in a way that corresponds to the questions in the initial FOIA request, but begins in the middle of the answer to question 4 and concludes with information corresponding to question 8. This document does not include copies of the underlying agency records that would be responsive to the request. The agency waived the fees for the 15-page partial production. A copy of this letter and the produced documents is attached as Exhibit "G."

41. By letter dated August 17, 2009, Plaintiffs' Counsel made a timely appeal of the agency's final response, charging that the agency's search was woefully inadequate, that the agency improperly withheld information in the 15-page partial production, that the agency failed to adequately justify its exemptions, and that the agency failed to provide basic identifying information necessary to evaluate whether any of the claimed exemptions were appropriate. A copy of this letter is attached as Exhibit "H."

42. By letter dated August 21, 2009, the Department of Justice released a 15-page document that CBP had apparently located during its initial search but which was referred to the Civil Rights

Division within the Department of Justice for review and release because it was the original author. The document was entitled, "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." A copy of this letter and the produced document is attached as Exhibit "I." By letter dated September 11, 2009, the Department of Homeland Security released two documents that CBP had apparently located during its initial search but which were referred to the Department of Homeland security for review and release. The agency directed Counsel to one document available online, entitled "The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities." The other document that the Department of Homeland Security actually produced was a memorandum entitled, "Implementing Secretary's Policy on the Use of Race or Ethnicity in Law Enforcement Activities." A copy of this letter and the produced documents is attached as Exhibit "J."

43. By letter dated September 4, 2009, Shari Suzuki, Chief of FOIA Appeals at CBP, confirmed receipt of the appeal and informed Counsel that the matter had been assigned to Cindy Owens and that any substantive legal issues should be raised with Ms. Owens. A copy of this letter is attached as Exhibit "K."

44. On September 9, 2009, Counsel received a telephone call from Ms. Owens indicating that CBP was prepared to search again for information and that she wanted to clarify what was meant by "Rochester Station" in the request. She indicated that she was investigating whether the agency would be able to produce the requested arrest records.

45. On or about September 15, 2009, Counsel's interns, Jeanette Markle and Alba Villa, spoke with Ms. Owens via telephone and answered her clarification question about the meaning of "Rochester Station" in the request. In that conversation, Ms. Owens explained how the agency maintained its I-213 arrest records and asked whether Counsel would be willing to narrow the scope

of the request for those particular records. Ms. Markle and Ms. Villa asked Ms. Owens to inquire with agency staff about how the request could be narrowed given the nature of the retention system and its searchability. Ms. Owens indicated a willingness to contact Immigration and Customs Enforcement to determine whether it would be able to produce the requested arrest records more easily than CBP. Ms. Owens also indicated that there were records responsive to the February 26, 2009 FOIA request that the agency had provided previously to other FOIA requestors and that the agency could release that information first. Ms. Owens also requested a faxed copy of the three-page document in which the first words are "Buffalo Sector Apps for FY 2003-FY 2008" that was produced by the agency in July 2009 in response to the request.

46. On September 25, 2009, Counsel's interns faxed Ms. Owens a letter expressing Counsel's interest in learning what other arrest statistics might be available similar to those contained in the "Buffalo Sector Apps for FY 2003-FY 2008" table and enclosing the three-page document beginning with "Buffalo Sector Apps for FY 2003-FY 2008" per Ms. Owen's request. A copy of this letter is attached as Exhibit "L."

47. On October 1, 2009, Counsel's intern, Ms. Markle, spoke with Ms. Owens to follow-up on the outstanding questions from the telephone conversation on or about September 15, 2009, including whether there were ways to narrow the I-213 arrest record request and whether Immigration and Customs Enforcement may be able to locate the arrest records more easily than CBP. Ms. Markle also inquired into whether Ms. Owens had been able to ascertain whether additional arrest data existed that was similar to the "Buffalo Sector Apps for FY 2003-FY 2008" data already provided. Ms. Owens indicated that she was still looking into these issues.

48. On November 9, 2009, Counsel's interns again followed up with Ms. Owens via letter about outstanding issues related to (1) when the agency expected to conduct its second search for

records and review for releasability, (2) ways in which Counsel could narrow the request for the I-213 arrest records, (3) whether Immigration and Customs Enforcement would be able to locate the arrest records more easily than CBP, and (4) how CBP keeps arrest statistics and the scope of data available beyond that already produced in the table entitled "Buffalo Sector Apps for FY 2003-FY 2008." A copy of this letter is attached as Exhibit "M."

49. On or about November 12, 2009, Counsel's intern, Ms. Markle, called Ms. Owens concerning the issues raised in the November 9, 2009 letter. Ms. Owens indicated that (1) she had not yet begun the process for reviewing the appeal and initiating the second search for documents, (2) she had not been able to get in touch with the appropriate person at Immigration and Customs Enforcement to inquire about the I-213 arrest records, (3) she was also unable to offer guidance on the options for narrowing the request for arrest records at that time, and (4) she had not spoken with anyone about the scope of the statistical information available beyond the "Buffalo Sector Apps for FY 2003-FY 2008" that was already produced. Ms. Owens indicated that she would contact Counsel's interns when she began to review the appeal and initiate the search.

50. By letter dated November 20, 2009, Counsel's intern, Ms. Markle, memorialized the telephone conversation that occurred on or about November 12, 2009. A copy of this letter is attached as Exhibit "N."

51. Counsel and her interns have had no further written or oral communications with Ms. Owens or anyone else at CBP concerning the February 26, 2009 FOIA request since November 20, 2009.

The Second Set of Requests for Information

52. On April 2, 2010, new FOIA requests were sent to CBP, ICE, and DHS pursuant to 5 U.S.C. § 552 requesting the production of records that would be valuable to Families for Freedom

in its advocacy as well as valuable in the representation of Jane Doe, Mary Doe, and John Doe in immigration court (collectively referred to as the “second set of FOIA requests”). These requests were all made and signed by Families for Freedom, Jane Doe, Mary Doe, and John Doe.

53. The April 2, 2010 request to CBP solicited the following information: (1) I-213 arrest forms for persons apprehended on inter-city trains and buses by officers out of the Rochester Border Patrol Station from 2003 to 2009; (2) arrest statistics for the Buffalo Sector and the Rochester Station from 2003 to 2009 for persons apprehended on inter-city trains and buses for whom I-213s were issued, broken down by length of time the immigrant was in the United States, country of citizenship, complexion, and criminal record; (3) total arrest statistics for the Buffalo Sector and the Rochester Station from 2003 to 2009 for people for whom I-213s were issued, broken down by length of time the immigrant was in the United States, country of citizenship, complexion, and criminal record; (4) total arrest statistics for the Buffalo Sector and the Rochester Station from 2003 to 2009; (5) staffing levels for the Buffalo Sector and the Rochester Station from 2003 to 2009; (6) explanations and listings of certain codes on the arrest forms, (7) arrest quotas, targets or goals for Border Patrol officers operating in the Buffalo Sector and at the Rochester Station for 2003 to 2009, (8) performance review standards for Border Patrol officers operating in the Buffalo Sector and at the Rochester Station for 2003 to 2009, (9) training materials on racial profiling, (10) training materials on inter-city train and bus enforcement operations, (11) reports concerning arrests on inter-city trains and buses from 2003 to 2009, (12) agreements, understandings, or communications between CBP or Border Patrol and inter-city train or bus operators regarding transportation checks; (13) agreements, understandings, or communications between CBP, Border Patrol, DHS, and/or ICE regarding transportation checks; and (14) standards of conduct for CBP officers at the border and in the interior. A copy of this request is attached as Exhibit “O.”

54. The April 2, 2010 request to CBP was received on April 6, 2010, according to the CBP receipt notice, dated May 10, 2010. A copy of the receipt notice is attached as Exhibit "T." The receipt letter also denied the request for a fee waiver,

55. By letter dated May 18, 2010, counsel filed an administrative challenge to the denial of a fee waiver, explaining that these documents will contribute to public understanding of CBP's transportation operations and that the requestors have no commercial interest in the documents requested.. A copy of that letter is attached as Exhibit "U".

56. CBP has failed to provide a substantive response to the April 2, 2010 request. It has now been more than thirty days since the date CBP received the FOIA request.

57. The April 2, 2010 request to ICE solicited information that was similar to the April 2, 2010 request to CBP, including the I-213 forms and related statistics and code explanations as well as inter-agency communications concerning transportation raids. In addition, the ICE request solicited records concerning performance standards, arrest quotas, targets, or goals for ICE officers, including those that can be satisfied by Border Patrol arrestees that are transferred to ICE custody. A copy of this request is attached as Exhibit "P."

58. By letter dated April 6, 2010 by Catrina M. Pavlik-Keenan, a FOIA Director, ICE acknowledged receipt of the April 2, 2010 request on April 6, 2010. Ms. Pavlik Keenan determined upon initial review that the information sought is under the purview of CBP and referred the request to CBP for processing and direct response. A copy of this letter is attached as Exhibit "Q."

59. ICE has failed to provide a substantive response to the April 2, 2010 request. It has now been more than thirty days since the date ICE received the FOIA request.

60. The April 2, 2010 request to DHS solicited the following information: (1) agreements, understandings, or communications between CBP, Border Patrol, DHS, and/or ICE regarding

transportation checks; (2) performance standards or arrest quotas, targets or goals for Border Patrol officers in effect during the past six years, preferably broken down by Sector and Station; (3) performance standards, arrest quotas, targets, or goals for ICE officers, including those that can be satisfied by Border Patrol arrestees that are transferred to ICE custody; and (4) reports containing information about arrests on inter-city trains and buses during the past six years. A copy of this request is attached as Exhibit "R."

61. By letter dated April 14, 2010 by Vania T. Lockett, an Associate Director for DHS's Disclosure and FOIA Operations, DHS acknowledged receipt of the April 2, 2010 request on April 8, 2010. Ms. Lockett indicated that requests (1) and (4) would be directed to the DHS Office of Policy for processing and direct response. Ms. Lockett also noted that requests (2) and (3) were already directed to CBP and ICE after speaking with Counsel's intern. During that conversation, Ms. Lockett indicated that it would not therefore be necessary to refer those requests to the respective component agencies. A copy of this letter is attached as Exhibit "S."

62. DHS has failed to provide a substantive response to the April 2, 2010 request. It has now been more than thirty days since the date ICE received the FOIA request.

63. Each of the April 2, 2010 FOIA requests also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) because there was a compelling and immediate need for the information. These records were sought to produce them as evidence in the immigration cases of Jane Doe, Mary Doe, and John Doe in support of their contention that Border Patrol's transportation raids are beyond the scope of its authority and violated their constitutional rights.

64. Each of the April 2, 2010 FOIA requests also requested a fee waiver on any charges exceeding \$100.00 pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k) because the

information sought “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.”

65. Plaintiffs have no commercial interest in this matter. They will make any information obtained as the result of these FOIA requests available to the public, including the press, at no fee. Plaintiffs therefore meet the statutory requirements for a fee waiver.

66. Plaintiffs expect to do a statistical study of the information obtained through this request so as to enhance public understanding of the nature of CBP’s transportation operations. In addition, Plaintiffs are aware of at least two other immigration court proceedings that involve respondents identified by Border Patrol through transportation raids who would benefit from the information sought in the instant FOIA requests. Plaintiffs will make any information obtained through these FOIA requests available to those respondents for use in their immigration court cases.

Implications of Failure to Adequately Respond to FOIA Requests

67. CBP has failed to provide a response to the first FOIA request’s appeal within the twenty days allowed under 5 U.S.C. § 552(a)(6)(A)(ii) and has failed to substantively respond to the second FOIA request within the twenty days allowed under 5 U.S.C. § 552(a)(6)(A)(i), resulting in constructive exhaustion of Plaintiffs’ administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

68. ICE and DHS have failed to substantively respond to their respective April 2, 2010 FOIA requests within the twenty days allowed under 5 U.S.C. § 552(a)(6)(A)(i), resulting in constructive exhaustion of Plaintiffs’ administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

69. CBP has failed to issue a determination on whether Plaintiffs are entitled to expedited processing for the first and second FOIA requests within the ten days allowed under 5 U.S.C. § 552(a)(6)(E)(ii). Requests for expedited processing do not need to be administratively exhausted. 5 U.S.C. § 552(a)(6)(E)(iii).

70. ICE and DHS have failed to issue a determination on whether Plaintiffs are entitled to expedited processing for their respective April 2, 2010 FOIA requests within the ten days allowed under 5 U.S.C. § 552(a)(6)(E)(ii). Requests for expedited processing do not need to be administratively exhausted. 5 U.S.C. § 552(a)(6)(E)(iii).

71. There is enormous interest in transportation raids by the public. *See* Tim Martinez, Newhouse School of Public Communications, Syracuse University, Caught in Transit: The Rochester Border Patrol Station, Newhouse School of Public Communications, Syracuse University, <http://cmr.syr.edu/newshouse/video/article.html> (last visited March 8, 2010) (featuring a video documenting Rochester Border Patrol's transportation raids; article notes that the Rochester Station had more arrests than any of the other fifty-five stations along the northern border); *see also* Emily Bazar, *Border Patrol Expands Transportation Checks*, USA Today, Oct. 1, 2008, available at http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks_N.htm (noting that Border Patrol is "working routes that don't cross into Canada or Mexico"); Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Oct. 2, 2008, available at http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm (noting that an "increasing number of people, legal and illegal, [are] crossing paths with the Border Patrol well inside the border. The agency, with a beefed-up force, is increasing surprise inspections on buses, trains and ferries on routes that don't cross the border. . . . Those inspections have come under fire from people . . . who believe agents sometimes question people based on their skin color or accent."); Nadja Drost, *Border Net Catches Few Terror Suspects*, Times Union, Apr. 19, 2009, available at <http://www.timesunion.com/AspStories/story.asp?storyID=791561> (finding that of all the national security and terrorism cases in district courts along the northern border, only three defendants were identified by Border Patrol); Darryl McGrath, *Strangers on a Train*, Metroland,

July 27, 2006, *available at* http://www.metroland.net/back_issues/vol29_no30/features.html (“U.S. Border Patrol agents are boarding Amtrak to question passengers in Rochester, raising concerns among everyone from immigrants to civil-liberties advocates.”); John O’Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Syracuse City News, July 5, 2008 (documenting a protest of the transportation raids at the Syracuse Regional Transportation Center).

72. Despite the interest in transportation raids, there is little if any hard data in the public domain concerning how often Border Patrol is conducting unlawful transportation raids, whether it is apprehending border-crossers or long-time residents, whether it is engaging in racial profiling, and whether it is actually catching “dangerous” immigrants or terrorists. The FOIA requests at issue here seek to illuminate these questions through arrest records (with fields that reflect complexion, country of citizenship, length of time in the country, and criminal history), quota or arrest goals, and other information concerning how transportation raids are performed.

73. By failing to respond to Plaintiffs’ first FOIA appeal in a timely manner, CBP has constructively withheld information contrary to the requirements of the FOIA statute and has frustrated Plaintiffs’ efforts to collect information of great public importance.

74. By failing to respond to Plaintiffs’ respective April 2, 2010 FOIA requests in a timely manner, CBP, ICE, and DHS have constructively withheld information contrary to the requirements of the FOIA statute and have frustrated Plaintiffs’ efforts to collect information of great public importance.

75. Plaintiffs have a statutory right to the records they seek and there is no legal basis for CBP’s, ICE’s, and DHS’s failures to release them in full. The agencies’ withholding of records is unlawful both in the refusal to provide the responsive information as well as in the creation of unnecessary and unreasonable delay in Plaintiffs’ receipt of the information.

76. The agencies' refusal to release the requested records in a timely fashion compromises the statutory and constitutional rights of thousands of U.S. citizens, permanent residents, and immigrant travelers.

77. The agencies' refusal to release the requested records in a timely fashion deprives Jane Doe, Mary Doe, John Doe, and other similarly situated individuals of the opportunity for a full and fair adjudication in their pending immigration removal proceedings.

78. The agencies' refusal to release the requested records in a timely fashion deprives the American people of the information it needs to make a reasoned and sound determination as to the legality, efficacy, and wisdom of Border Patrol's transportation raids.

FIRST CLAIM FOR RELIEF
Defendants Failed to Disclose and
Release Records Responsive to Plaintiffs' Requests

79. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 77 as if repeated and incorporated herein.

80. By failing to disclose and release the requested records, CBP, ICE, and DHS have violated Plaintiffs' rights to records under 5 U.S.C. § 552.

SECOND CLAIM FOR RELIEF
Defendants Have Failed to Make a Determination
on Plaintiffs' Requests for Expedited Processing

81. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 79 as if repeated and incorporated herein.

82. By failing to make a timely decision on Plaintiff's requests for expedited processing, and by failing to grant such expedited processing, CBP, ICE, and DHS have violated Plaintiffs' rights under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- 1) Assume jurisdiction over this matter;
- 2) Declare that Defendants' refusal to disclose the records requested by Plaintiffs is unlawful;
- 3) Order Defendants to immediately make a full, adequate, and expedited search for the requested records;
- 4) Order Defendants to make the requested records available to Plaintiffs forthwith, and not later than July 15, 2010 and enjoin them from withholding the requested records;
- 5) Award Plaintiffs their costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(4)(E);
- 6) Enjoin Defendants from assessing fees or costs for the processing of the FOIA Request; and
- 7) Grant such other and further relief as this Court may deem just and proper.

Dated: May 21, 2010
New York, New York

Respectfully submitted,

By: 

Nancy Morawetz, Esquire, NM1193
Jeanette Markle, Legal Intern
Alba Villa, Legal Intern
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6430
nancy.morawetz@nyu.edu
Counsel for Plaintiffs

Exhibit A

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 6th FLOOR, NEW YORK, NY 10012
TEL: (212) 998-6430 - FAX: (212) 995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

CARLY LEINHEISER
MARIBEL HERNANDEZ
Legal Interns

February 26, 2009

U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Sir or Madam:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, and on behalf of the Immigrant Rights Clinic of Washington Square Legal Services, Inc., we request a copy of the following records:

- (1) Copies of all I-213 forms issued for persons arrested on Amtrak trains by Customs and Border Protection (CBP) officers operating out of the Rochester Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (2) The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was "Over 1 Year."
- (3) The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was described as being as period less than one year.
- (4) The total number of persons who were arrested by officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (5) Any documents that explain the meaning of the code TCP 518.3 on the I-213 under the box labeled "Method of Location/Apprehension."
- (6) Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code.
- (7) Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 under the box labeled "Status When Found."
- (8) Any documents that list other possible phrases that could be filled in under "Status When Found" along with a description of the meaning of each phrase.

- (9) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Buffalo Sector were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (10) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Rochester Station were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (11) Performance review standards for CBP officers operating in the Buffalo Sector for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (12) Performance review standards for CBP officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (13) All training materials addressing racial profiling.
- (14) All training materials that pertain to the conduct of CBP officers on Amtrak trains.
- (15) Any other reports that contain information about the persons arrested on Amtrak trains for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (16) Any agreements between CBP and Amtrak.
- (17) Any materials concerning the standards that apply to the conduct of CBP officers at the border.
- (18) Any materials concerning the standards that apply to the conduct of CBP officers in the interior of the United States.

Requestors request that any records that exist in electronic form be provided in electronic format on a compact disk. If any of the requested records or information is not kept in a succinct format, we request the opportunity to view the documents in your offices.

We agree to pay search, duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). A fee waiver would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (discussing that Congress intended the FOIA to be construed broadly to favor fee waivers for noncommercial requests). The Washington Square Legal Services, Inc. is a nonprofit organization representing indigent clients.

On January 21, 2009, President Barack Obama issued a Memorandum regarding the FOIA in which he stated that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President's Memorandum underscores the importance of prompt and full disclosure of documents requested pursuant to the FOIA. Agencies must make every effort to disclose requested documents and not frivolously withhold information that could be released to the public without compromising a significant government interest. We therefore request a full and complete response to our request.

The requested information is in the public interest because it will contribute significantly to the public understanding of CBP's operations, activities and inspections in the interior of the United States that affect persons living and traveling inside the United States and it is not primarily in the commercial interest of the requester. There is currently great public interest in this subject, as evidenced by the recent publication of numerous newspaper articles. (See, e.g., John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Central NY News, July 5, 2008 and Jennifer Lee, *A Protest Over Bus and Train Citizenship Checks*, NY Times, April 2, 2008.) This information is also of interest to persons who were placed in removal proceedings as a result of these inspections.

We are requesting this information in connection with our representation of a client who is in removal proceedings and in anticipation of an upcoming hearing at 26 Federal Plaza, New York, NY. We therefore respectfully request expedited processing of this request.

Please contact us at (212) 998-6430 with any questions. Please supply all records to:

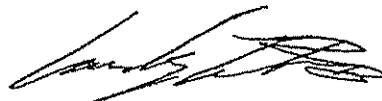
Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Thank you for your prompt attention to this matter.

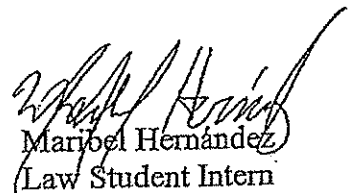
Very truly yours,



Nancy Morawetz
Supervising Attorney



Carly Leinheiser
Law Student Intern



Mariabel Hernández
(Law Student Intern)

Exhibit B



**U.S. Customs and
Border Protection**

April 9, 2009

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: 2009F8709

Dear Ms. Morawetz:

This acknowledges receipt of your Freedom of Information Act/Privacy Act (FOIA/PA) request to U.S. Customs & Border Protection (CBP), dated February 26, 2009. We have included a copy of your request for your reference.

In order to clarify your request please be advised we are interpreting your use of Customs and Border Protection Officers (CBPO) to refer to Border Patrol Agents (BPA). This interpretation is based on your request consistently referring to the Buffalo Sector and Rochester Station both of which are staffed by BPAs and not CBPOs. If instead you are interested in the records pertaining to the CBPOs working the ports-of-entry constrained within the boundary of the Buffalo Sector please advise this office in writing within 10 days from the date of this letter.

Please be advised pertaining to records requested under numbers 1 and 11 that Department of Homeland Security (DHS) regulations require, in the case of third party information requests, a statement from the individual verifying his or her identity and certifying that individual's agreement that records concerning him or her may be accessed, analyzed and released to a third party. See 6 C.F.R. § 5.21(f). Because you have not provided this documentation with your request, we are unable to initiate a search for responsive records.

Please provide the requested documentation within 10 days from the date of this letter, or we will assume you are no longer interested in these portions of your FOIA/PA request. This is not a denial of your request for these records. Upon receipt of statements for the individuals involved we will initiate a search for responsive records.

Additionally, in reference to your request for number 16 there is no agreement between CBP and Amtrak. The authorization you are seeking would be found in 8 USC §1357(a). Also, pursuant to numbers 17 and 18 please refer to 5 CFR §2635 – Standards of Ethical Conduct for Employees of the Executive Branch and 5 CFR §735 – Employee Responsibilities and Conduct.

Pertaining to the remainder of your request, due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, CBP processes FOIA requests according to their order of receipt.

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 Interim FOIA regulations as they apply to "all other" or non-commercial requesters. Pursuant to the DHS implementing regulations, 6 C.F.R. § 5.11 "all other" or non-commercial requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate of the searcher. You stated in your request that you are willing to pay assessable fees up to \$100.00. You will be contacted before any additional fees are accrued.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

We have queried the appropriate offices for responsive records. If any responsive records are located, they will be reviewed for determination of releasability and applicability of the request for a fee waiver. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number 2009F8709. Please refer to this identifier in any future correspondence. You may contact this office at (202)325-0150.

Sincerely,



Mark Hanson
Director
FOIA Division
Office of International Trade

Enclosures

U.S. Customs and Border Protection
Office of International Affairs
FOIA Division
799 9th St NW – 7th Floor
Washington, DC 20229-1177

REQUEST FOR RECORDS/PRIVACY ACT RELEASE FORM
Requests received without a letter of explanation will not be processed.
(Please Print)

| | | |
|-------------------------------------|-----------------------------------|-----------------------------|
| Family Name | Given Name | Middle Name |
| Address (Street Number and Name) | | Apt Number |
| City | State | Zip Code |
| Date of Birth | Country of Birth | Other names used; if any |
| Name at time of entry into the U.S. | Date of Entry into the U.S. | Port of Entry into the U.S. |
| Passport Number | Alien Registration Number | Petition or Claim Receipt |
| I-94 Admission Number | Naturalization Certificate Number | Naturalization Date |

(SIGNATURE OF INDIVIDUAL INFORMATION IS REQUESTED FOR)

Date

Consent to Release Information *(Complete if name is different from requester)*

I understand that knowingly or willfully seeking or obtaining access to records and/or information about another person under false pretenses is punishable by a fine up to \$5,000. I also understand that any applicable fees must be paid by me. I request that any located and disclosable CBP records and/or information be forwarded to:

Name of Requester (Last, First and Middle Name)

| | |
|----------------------------------|------------|
| Address (Street Number and Name) | Apt Number |
| City | State |
| | Zip Code |

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature

Date

Note: The signature on this request is not required to be notarized; however, severe penalties may apply for false identification.

Revised January, 2006

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 6th FLOOR, NEW YORK, NY 10012
TEL: (212) 998-6430 - FAX: (212) 995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

CARLY LEINHEISER
MARIBEL HERNANDEZ
Legal Interns

2009 Feb 20 9

February 26, 2009

U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Sir or Madam:

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Please contact us at (212) 998-6430 with any questions. Please supply all records to:

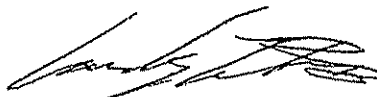
Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Thank you for your prompt attention to this matter.


Very truly yours,



Nancy Morawetz
Supervising Attorney



Carly Leinheiser
Law Student Intern



Mariabel Hernández
Law Student Intern

Exhibit C

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 6th FLOOR, NEW YORK, NY 10012
TEL: (212) 998-6430 - FAX: (212) 995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

CARLY LEINHEISER
MARIBEL HERNANDEZ
Legal Interns

April 17, 2009

Mark Hanson
U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: 2009F8709

Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Mr. Hanson:

This letter is in reply to your correspondence dated April 9, 2009. For your reference, we attach a copy of your correspondence and of our original request.

First, we would like to clarify that we indeed mean Border Patrol Agents (BPAs).

Second, in regards to records requested under numbers 1 and 11 we do not believe that 6 C.F.R. § 5.21(f) applies since the requests ask for redacted documents and standards of general applicability. To address any privacy concern, the records requested under number 1 ask for redacted copies of I-213 forms. The copies are to exclude the names and A-numbers of the persons arrested and are intended to provide statistical information. The information requested under number 11 deals with performance review standards that apply to all BPAs operating in the Buffalo Sector. Thus, they do not "concern[] an individual on behalf of that individual." 6 C.F.R. § 5.21(f).

We look forward to receiving a full and complete response to our request in accordance with President Obama's January 21, 2009 Memorandum which states that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

We remind you that we are requesting this information in connection with our representation of a client who is in removal proceedings and has a hearing scheduled for May 26, 2009 at 26 Federal Plaza, New York, NY. We therefore respectfully request expedited processing of this request.

Please contact us at (212) 998-6430 with any questions. Please supply all records to:

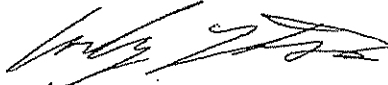
Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Thank you for your prompt attention to this matter.

Very truly yours,



Nancy Morawetz
Supervising Attorney



Carly Leinheiser
Law Student Intern



Maribel Hernández
Law Student Intern

Exhibit D



**U.S. Customs and
Border Protection**

June 2, 2009

2009F8709

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: Border Patrol Agents (BPAs)

Dear Ms. Morwetz :

This acknowledges receipt of your Freedom of Information Act/Privacy Act (FOIA/PA) request to U.S. Customs & Border Protection (CBP), dated April 17, 2009, seeking files on Border Patrol Agents (BPAs) .

Please be advised that DHS regulations require, in the case of third party information requests, a statement from the individual verifying his or her identity and certifying that individual's agreement that records concerning him or her may be accessed, analyzed and released to a third party. See 6 C.F.R. § 5.21(f). Because you have not provided this documentation with your request, we are unable to initiate a search for responsive records.

This is not a denial of your request. Upon receipt of a perfected request, you will be advised as to the status of your request.

If you have any questions or would like to discuss this matter, please feel free to contact this office at 202-325-0150

Sincerely,

A handwritten signature in black ink that reads "Mark Hanson".

Mark Hanson
Director
FOIA Division
Office of International Trade

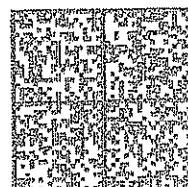
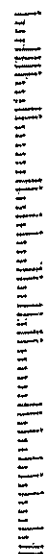


U.S. Customs and
Border Protection

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WASHINGTON, DC 20229-_____

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Exhibit E

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NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

CARLY LEINHEISER
MARIBEL HERNANDEZ
Legal Interns

June 9, 2009

Mark Hanson
U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: 2009F8709

Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Mr. Hanson:

This letter is in reply to your correspondence dated June 2, 2009.

In your letter, you request that we provide statements from all persons whose records are part of our FOIA request certifying that they have agreed to our review of their records. We believe that this is an inappropriate requirement in light of the nature of our request.

As is explained in our prior correspondence, we do not believe that 6 C.F.R. § 5.21(f) applies since the requests ask for redacted documents and standards of general applicability. To address any privacy concern, the records requested under number 1 ask for redacted copies of I-213 forms. The copies are to exclude the names and A-numbers of the persons arrested and are intended to provide statistical information. The information requested under number 11 deals with performance review standards that apply to all BPAs operating in the Buffalo Sector. Thus, they do not "concern[] an individual on behalf of that individual." 6 C.F.R. § 5.21(f). We would also be happy to discuss further redactions if that would satisfy your concerns about the identifiability of individuals in these documents.

We also note that we have also requested information that would not involve any redactions relating to individuals. We request that these documents be provided as soon as possible.

We look forward to receiving a full and complete response to our request in accordance with President Obama's January 21, 2009 Memorandum which states that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

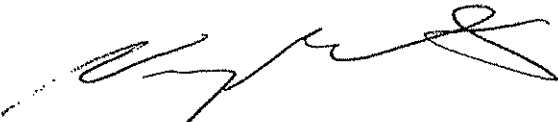
In our prior correspondence we explained that we are requesting this information in connection with our representation of a client who is in removal proceedings and has a hearing scheduled for May 26, 2009 at 26 Federal Plaza, New York, NY. We will be making further submissions in that case in July. We therefore respectfully request that you expedite the processing of our request. As you know, we have been waiting for a very long time for your answers.

Please contact us at (212) 998-6430 with any questions. Please supply all records to:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Thank you for your prompt attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Nancy Morawetz', with a stylized, flowing script.

Nancy Morawetz
Supervising Attorney

Exhibit F

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 6th FLOOR, NEW YORK, NY 10012
TEL: (212) 998-6430 - FAX: (212) 995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

5

June 16, 2009

Mark Hanson
U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: 2009F8709

Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Mr. Hanson:

This letter is to inform you that Families for Freedom, a New York-based multi-ethnic defense network by and for immigrants facing and fighting deportation, joins in the pending request for documents and statistics related to the arrests of individuals traveling on trains in the Buffalo Sector, and related requests for performance standards and other agency documents.

As we explained in our prior letters, the documents we request are of significant public interest. We request that these documents be produced expeditiously.

Very truly yours,

Nancy Morawetz
Supervising Attorney

Exhibit G



**U.S. Customs and
Border Protection**

JUL 22 2009

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: 2009F8709

Dear Ms. Morawetz:

This is the final response to your Freedom of Information Act (FOIA) requests to U.S. Customs and Border Protection, dated February 26, 2009. You are seeking records pertaining to apprehensions on Amtrak trains by Border Patrol Agents and related documents to the I-213.

A search of the Office of Border Patrol for documents responsive to your request produced a total of 81 pages. Of those pages, we have determined that 15 pages are partially released, and 50 pages are withheld in their entirety pursuant to Title 5 U.S.C. §552 (b)(2)(high), (b)(2)(low), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E); FOIA Exemptions 2 (high), 2(low), 5, 6, b7(C), b7(E). Please be advised we have a document from the Department of Homeland Security (DHS) and the U.S. Department of Justice (DOJ) which we are prohibited from releasing to you. We have taken the liberty of referring this documents to DHS and DOJ for review and direct response to you.

Enclosed is a CD containing 15 pages with certain information withheld pursuant to 5 U.S.C. §552 (b)(2)(high), (b)(2)(low), (b)(6), (b)(7)(C), and (b)(7)(E). Explanations used in the withholding are described below.

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

FOIA Exemption 2(low) protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy.

FOIA Exemption b7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, we have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

You have a right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: U.S. Customs and Border Protection, FOIA Appeals, Policy and Litigation Branch, 799 9th Street NW- 5th Floor, Washington, DC 20229-1179, following the procedures outlined in the Department of Homeland Security (DHS) regulations at 6 C.F.R. §5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provision of the FOIA allow us to recover part of the cost of complying with your request. In this instance, we have taken the liberty of waiving the applicable fees. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to 2009F8709. This office can be reached at (202) 325-0150.

Sincerely,

A handwritten signature in cursive script that reads "Mark Hanson".

Mark Hanson

Director

FOIA Division

Office of International Trade

Enclosure



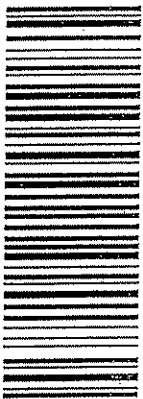
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Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, New York 10012

2. Interior

(b) (2)

(b) (2)

409 B Traffic check.

(b) (2)

(b) (2)

409 C Transportation Check

(b) (2)

(b) (2)

409 D Boat Patrol

(b) (2)

(b) (2)

409 E Air Patrol.

(b) (2)

(b) (2)

409 F Crewman/Stowaway.

(b) (2)

(b) (2)

410. General Enforcement - Total Officer Hours.

(b) (2)

(b) (2)

410.A Employer Sanctions.

(b) (2)

(b) (2)

410.B Criminal Alien Program.

(b) (2)

(b) (2)

410.C Anti-smuggling.

(b) (2)

(b) (2)

7 and 8) Status When Found

H. Employment Status - Enter the number of aliens located in the following categories.

1. Column 21 - Heavy industry - (b) (2)
(b) (2)

2. Column 22 - (b) (2)
(b) (2)

3. Column 23 - Agriculture - (b) (2)
(b) (2)

4. Column 24 - Construction - (b) (2)
(b) (2)

5. Column 25 - Service - (b) (2)
(b) (2)

6. Column 26 - Welfare - (b) (2)
(b) (2)

7. Column 27 - Seeking employment - (b) (2)
(b) (2)

I. Other -

1. Column 28 - Institution - (b) (2)
(b) (2)

2. Column 29 - Travel - Enter the number of aliens found in travel. This means an alien found who is going from one point to another except in daily travel within his own community or to and from work. (b) (2)
(b) (2)

UNITED STATES, PETITIONER v. CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

No. 01-631

SUPREME COURT OF THE UNITED STATES

536 U.S. 194; 122 S. Ct. 2105; 153 L. Ed. 2d 242; 2002 U.S. LEXIS 4420; 70 U.S.L.W. 4552; 2002 Cal. Daily Op. Service 5321; 2002 Daily Journal DAR 6707; 15 Fla. L. Weekly Fed. S 367

April 16, 2002, Argued
June 17, 2002, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

United States v. Drayton, 231 F.3d 787, 2000 U.S. App. LEXIS 26791 (11th Cir. Fla. 2000)

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

SYLLABUS: The driver of the bus on which respondents were traveling allowed three police officers to board the bus as part of a routine drug and weapons interdiction effort. One officer knelt on the driver's seat, facing the rear of the bus, while another officer stayed in the rear, facing forward. Officer Lang worked his way from back to front, speaking with individual passengers as he went. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke. He testified that passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so without argument; that most people are willing to cooperate; that passengers often leave the bus for a cigarette or a snack while officers are on board; and that, although he sometimes informs passengers of their right to refuse to cooperate, he did not do so on the day in question. As Lang approached respondents, who were seated together, he held up his badge long enough for them to identify him as an officer. Speaking just loud enough for them to hear, he declared that the police were looking for drugs and weapons and asked if respondents

had any bags. When both of them pointed to a bag overhead, Lang asked if they minded if he checked it. Respondent Brown agreed, and a search of the bag revealed no contraband. Lang then asked Brown whether he minded if Lang checked his person. Brown agreed, and a pat-down revealed hard objects similar to drug packages in both thigh areas. Brown was arrested. Lang then asked respondent Drayton, "Mind if I check you?" When Drayton agreed, a pat-down revealed objects similar to those found on Brown, and Drayton was arrested. A further search revealed that respondents had taped cocaine between their shorts. Charged with federal drug crimes, respondents moved to suppress the cocaine on the ground that their consent to the pat-down searches was invalid. In denying the motions, the District Court determined that the police conduct was not coercive and respondents' consent to the search was voluntary. The Eleventh Circuit reversed and remanded based on its prior holdings that bus passengers do not feel free to disregard officers' requests to search absent some positive indication that consent may be refused.

Held: The Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. Pp. 5-12.

(a) Among its rulings in *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382, this Court held that the Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to searches, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter, *id.*, at 436. The Court identified as "particularly worth noting" the factors that the officer, although obviously armed, did not unholster his gun or use it in a threatening way, and that he advised respondent passenger that he could refuse consent to a search. Relying on this last factor, the Eleventh Circuit

erroneously adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdictions on buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. Pp. 5-8.

(b) Applying *Bostick's* framework to this case demonstrates that the police did not seize respondents. The officers gave the passengers no reason to believe that they were required to answer questions. When Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter, or would indicate a command to answer his questions. There were ample grounds to conclude that their encounter was cooperative and not coercive or confrontational. There was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat, and no command, not even an authoritative tone of voice. Had this encounter occurred on the street, it doubtless would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning into an illegal seizure. See *Bostick*, 501 U.S. at 439-440. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in deciding not to cooperate on a bus than in other circumstances. Lang's display of his badge is not dispositive. See, e.g., *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 83 L. Ed. 2d 165, 105 S. Ct. 308. And, because it is well known that most officers are armed, the presence of a holstered firearm is unlikely to be coercive absent active brandishing of the weapon. Officer Hoover's position at the front of the bus also does not tip the scale to respondents, since he did nothing to intimidate passengers and said or did nothing to suggest that people could not exit. See *INS v. Delgado*, 466 U.S. 210, 219, 80 L. Ed. 2d 247, 104 S. Ct. 1758. Finally, Lang's testimony that only a few passengers refuse to cooperate does not suggest that a reasonable person would not feel free to terminate the encounter. See *id.*, at 216. Drayton argues unsuccessfully that no reasonable person in his position would feel free to terminate the encounter after Brown was arrested. The arrest of one person does not mean that everyone around him has been seized. Even after arresting Brown, Lang provided Drayton with no indication that he was required to answer Lang's questions. Pp. 8-10.

(c) Respondents were not subjected to an unreasonable search. Where, as here, the question of voluntariness pervades both the search and seizure inquiries, the

respective analyses turn on very similar facts. For the foregoing reasons, respondents' consent to the search of their luggage and their persons was voluntary. When respondents told Lang they had a bag, he asked to check it. And when he asked to search their persons, he inquired first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Moreover, officers need not always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 93 S. Ct. 2041. While knowledge of the right to refuse is taken into account, the Government need not establish such knowledge as the *sine qua non* of an effective consent. *Ibid.* Nor does a presumption of invalidity attach if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the totality of the circumstances controls, without giving extra weight to whether this type of warning was given. See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39-40, 136 L. Ed. 2d 347, 117 S. Ct. 417. Although Lang did not give such a warning, the totality of the circumstances indicates that respondents' consent was voluntary, and the searches were reasonable. Pp. 10-12.

231 F.3d 787, reversed and remanded.

COUNSEL:

Larry D. Thompson, for petitioner.

Gwendolyn Spivey, appointed by this Court, for respondents.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined.

OPINION BY: KENNEDY

OPINION: [**2108] [***249] [*197]

JUSTICE KENNEDY delivered the opinion of the Court.

[***LEDHR1A] [1A] The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse. *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991). This case requires us to determine whether officers must advise bus passengers during these encounters of their right not to cooperate. [**2109]

On February 4, 1999, respondents Christopher Drayton and Clifton Brown, Jr., were traveling on a Greyhound bus en route from Ft. Lauderdale, Florida, to Detroit, Michigan. The bus made a scheduled stop in Tallahassee, Florida. The passengers were required to disembark so the bus could be refueled and cleaned. As the passengers reboarded, the driver checked their tickets and then left to complete paperwork inside the terminal. As he left, the driver allowed three members of the Tallahassee Police Department to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges.

Once onboard Officer Hoover knelt on the driver's seat and faced the rear of the bus. He could observe the passengers [*198] and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn went to the rear of the bus. Blackburn remained stationed there, facing forward. Lang worked his way toward the front of the bus, speaking with individual passengers as he went. He asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

***250] According to Lang's testimony, passengers who declined to cooperate with him or who chose to exit the bus at any time would have been allowed to do so without argument. In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel. Lang could recall five to six instances in the previous year in which passengers had declined to have their luggage searched. It also was common for passengers to leave the bus for a cigarette or a snack while the officers were on board. Lang sometimes informed passengers of their right to refuse to cooperate. On the day in question, however, he did not.

Respondents were seated next to each other on the bus. Drayton was in the aisle seat, Brown in the seat next to the window. Lang approached respondents from the rear and leaned over Drayton's shoulder. He held up his badge long enough for respondents to identify him as a police officer. With his face 12-to-18 inches away from Drayton's, Lang spoke in a voice just loud enough for respondents to hear:

"I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being

transported on the bus. Do you have any bags on the bus?" App. 55. [*199]

Both respondents pointed to a single green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?" and Brown responded, "Go ahead." *Id.*, at 56. Lang handed the bag to Officer Blackburn to check. The bag contained no contraband.

Officer Lang noticed that both respondents were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics. The officer thus asked Brown if he had any weapons or drugs in his possession. And he asked Brown: "Do you mind if I check your person?" Brown answered, "Sure," and cooperated by leaning up in his seat, pulling a cell phone out of his pocket, and opening up his jacket. *Id.*, at 61. Lang reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects similar to drug packages detected on other occasions. Lang arrested and handcuffed Brown. Officer Hoover escorted Brown from the bus.

Lang then asked Drayton, "Mind if I check you?" *Id.*, at 65. Drayton responded [**2110] by lifting his hands about eight inches from his legs. Lang conducted a pat-down of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him from the bus. A further search revealed that respondents had duct-taped plastic bundles of powder cocaine between several pairs of their boxer shorts. Brown possessed three bundles containing 483 grams of cocaine. Drayton possessed two bundles containing 295 grams of cocaine.

Respondents were charged with conspiring to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and 846, and with possessing cocaine with intent to distribute it, in violation of § 841(a)(1). They moved to suppress the cocaine, arguing that the consent [***251] to the pat-down search was invalid. Following a hearing at which only Officer Lang testified, the [*200] United States District Court for the Northern District of Florida denied their motions to suppress. The District Court determined that the police conduct was not coercive and respondents' consent to the search was voluntary. The District Court pointed to the fact that the officers were dressed in plain clothes, did not brandish their badges in an authoritative manner, did not make a general announcement to the entire bus, and did not address anyone in a menacing tone of voice. It noted that the officers did not block the aisle or the exit, and stated that it was "obvious that [respondents] can get up and leave, as can the people ahead of them." App. 132. The District Court concluded: "Everything that took place

between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." *Ibid.*

The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions to grant respondents' motions to suppress. 231 F.3d 787 (2000). The court held that this disposition was compelled by its previous decisions in *United States v. Washington*, 151 F.3d 1354 (1998); and *United States v. Guapi*, 144 F.3d 1393 (1998). Those cases had held that bus passengers do not feel free to disregard police officers' requests to search absent "some positive indication that consent could have been refused." *Washington, supra*, at 1357.

[***LEdHR2A] [2A] [***LEdHR3A] [3A] We granted certiorari. 534 U.S. 1074, 151 L. Ed. 2d 689, 122 S. Ct. 803 (2002). The respondents, we conclude, were not seized and their consent to the search was voluntary; and we reverse.

II

[***LEdHR4] [4] Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. See, e.g., *Florida v. Royer*, 460 U.S. 491, 497, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) [*201] (plurality opinion); see *id.*, at 523, n. 3 (REHNQUIST, J., dissenting); *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 83 L. Ed. 2d 165, 105 S. Ct. 308 (1984) (*per curiam*) (holding that such interactions in airports are "the sort of consensual encounters that implicate no Fourth Amendment interest"). Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage -- provided they do not induce cooperation by coercive means. See *Florida v. Bostick*, 501 U.S. at 434-435 (citations omitted). If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.

The Court has addressed on a previous occasion the specific question of drug interdiction efforts on buses. In *Bostick*, two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine. In doing so it adopted a *per* [*2111] *se* rule that due to the cramped confines onboard a bus the act of questioning would deprive [***252] a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment.

[***LEdHR1B] [1B] This Court reversed. *Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.*, at 439. The Court noted next that the traditional rule, which states that a seizure does not occur so long as a reasonable person would feel free "to disregard the police and go about his business," *California v. Hodari D.*, 499 U.S. 621, 628, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991), is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. *Bostick*, 501 U.S. at 434-436. A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing [*202] about whether the police conduct is coercive. *Id.*, at 436. The proper inquiry "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Ibid.* Finally, the Court rejected *Bostick's* argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. The reasonable person test, the Court explained, is objective and "presupposes an innocent person." *Id.*, at 437-438.

In light of the limited record, *Bostick* refrained from deciding whether a seizure occurred. *Id.*, at 437. The Court, however, identified two factors "particularly worth noting" on remand. *Id.*, at 432. First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search. *Ibid.*

[***LEdHR5] [5] Relying upon this latter factor, the Eleventh Circuit has adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. In *United States v. Guapi, supra*, the Court of Appeals described "the most glaring difference" between the encounters in *Guapi* and in *Bostick* as "the complete lack of any notification to the passengers that they were in fact free to decline the search request Providing [this] simple notification . . . is perhaps the most efficient and effective method to ensure compliance with the Constitution." 144 F.3d at 1395. The Court of Appeals then listed other factors that contributed to the coerciveness of the encounter: (1) the officer conducted the interdiction before the passengers disembarked from the bus at a scheduled stop; (2) the officer explained his presence in the form of a general announcement to the entire bus; (3) the officer wore a police uniform; and (4)

the officer questioned passengers as he [*203] moved from the front to the rear of the bus, thus obstructing the path to the exit. *Id.*, at 1396.

After its decision in *Guapi* the Court of Appeals decided *United States v. Washington* and the instant [***253] case. The court suppressed evidence obtained during similar drug interdiction efforts despite the following facts: (1) the officers in both cases conducted the interdiction after the passengers had re-boarded the bus; (2) the officer in the present case did not make a general announcement to the entire bus but instead spoke with individual passengers; (3) the officers in both cases were not in uniform; and (4) the officers in both cases questioned passengers as they moved from the rear to the front of the bus and were careful not to obstruct passengers' means of egress from the bus. [**2112]

Although the Court of Appeals has disavowed a *per se* requirement, the lack of an explicit warning to passengers is the only element common to all its cases. See *Washington*, 151 F.3d at 1357 ("It seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests"); 231 F.3d at 790 (noting that "this case is controlled by" *Guapi* and *Washington*, and dismissing any factual differences between the three cases as irrelevant). Under these cases, it appears that the Court of Appeals would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate. The Court of Appeals erred in adopting this approach.

[***LEdHR2B] [2B] Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he [*204] did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

[***LEdHR2C] [2C] [***LEdHR6] [6] There were ample grounds for the District Court to conclude that "everything that took place between Officer Lang and [respondents] suggests that it was cooperative" and that there "was nothing coercive [or] confrontational" about the encounter. App. 132. There was no application of

force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. See *Bostick*, 501 U.S. at 439-440. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.

[***LEdHR2D] [2D] [***LEdHR7] [7] Respondents make much of the fact that Officer Lang displayed his badge. In *Florida v. Rodriguez*, 469 U.S. at 5-6, however, the Court rejected the claim that the defendant was [***254] seized when an officer approached him in an airport, showed him his badge, and asked him to answer some questions. Likewise, in *INS v. Delgado*, 466 U.S. 210, 212-213, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984), the Court held that INS agents' wearing badges and questioning workers in a factory did not constitute a seizure. And while neither Lang nor his colleagues were in uniform or visibly armed, those factors should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. [*205] Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

[***LEdHR2E] [2E] Officer Hoover's position at the front of the bus also does not tip the scale in respondents' favor. Hoover did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear. In *Delgado*, the Court determined there was no seizure even though several uniformed INS officers were stationed near the exits of the [***2113] factory. *Id.*, at 219. The Court noted: "The presence of agents by the exits posed no reasonable threat of detention to these workers; . . . the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Ibid.*

[***LEdHR8] [8] Finally, the fact that in Officer Lang's experience only a few passengers have refused to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. In Lang's experience it was common for passengers to leave

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the bus for a cigarette or a snack while the officers were questioning passengers. App. 70, 81. And of more importance, bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado, supra*, at 216.

[***LEdHR9] [9] Drayton contends that even if Brown's cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter with the officers after Brown had been arrested. The Court [*206] of Appeals did not address this claim; and in any event the argument fails. The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after arresting Brown, Lang addressed Drayton in a polite manner and provided him with no indication that he was required to answer Lang's questions.

[***LEdHR3B] [3B] We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, *i.e.*, whether their consent to the suspicionless search was involuntary. In [*255] circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts. And, as the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.

[***LEdHR3C] [3C] [***LEdHR10A] [10A] The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. See, *e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39-40, 136 L. Ed. 2d 347, 117 S.

Ct. 417 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective [*207] consent." *Ibid*. Nor do this Court's decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning. See, *e.g.*, *Schneekloth*, [*2114] 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041; *Robinette*, 519 U.S. at 39-40. Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.

[***LEdHR10B] [10B] In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

[***LEdHR11] [11] We need not ask the alternative question whether, after the arrest of Brown, there were grounds for a *Terry* stop and frisk of Drayton, though this may have been the case. It was evident that Drayton and Brown were traveling together -- Officer Lang observed the pair reboarding the bus together; they were each dressed in heavy, baggy clothes that were ill-suited for the day's warm temperatures; they were seated together on the bus; and they each claimed responsibility for the single piece of green carry-on luggage. Once Lang had identified Brown as carrying what he believed to be narcotics, he may have had reasonable suspicion to conduct a *Terry* stop and frisk on Drayton as well. That question, however, has not been presented to us. The fact the officers may have had reasonable suspicion does not [*256] prevent them from relying on a citizen's consent to the search. It would be a paradox, and one most puzzling to law enforcement officials and courts alike, were [*208] we to say, after holding that Brown's consent was voluntary, that Drayton's consent was ineffectual simply because the police at that point had more compelling grounds to detain him. After taking Brown into custody, the officers were entitled to continue to proceed on the basis of consent and to ask for Drayton's cooperation.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: SOUTER

DISSENT:

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to "enhance their own safety and the safety of those around them." *Ante*, at 10. Nor are the other factual assessments underlying the Court's conclusion in favor of the Government more convincing.

The issue we took to review is whether the police's examination of the bus passengers, including respondents, amounted to a suspicionless seizure under the Fourth Amendment.ⁿ¹ If it did, any consent to [**2115] search was plainly [*209] invalid as a product of the illegal seizure. See *Florida v. Royer*, 460 U.S. 491, 507-508, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) (plurality opinion) ("The consent was tainted by the illegality and . . . ineffective to justify the search"); *id.*, at 509 (Powell, J., concurring); *id.*, at 509 (Brennan, J., concurring in result).

ⁿ¹ The Court proceeds to resolve the voluntariness issue on the heels of its seizure enquiry, but the voluntariness of respondents' consent was not within the question the Court accepted for review. Accord, Reply Brief for United States 20; n. 7 (stating that the consent issue "is not presented by this case; the question here is whether there was an illegal seizure in the first place"). While it is true that the Eleventh Circuit purported to address the question "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary,'" 231 F.3d 787, 788 (2000), elsewhere the court made it clear that it was applying the test in *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991), which is relevant to

the issue of seizure, 231 F.3d at 791, n. 6. There is thus no occasion here to reach any issue of consent untainted by seizure. If there were, the consent would have to satisfy the voluntariness test of *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973), which focuses on "the nature of a person's subjective understanding," *id.*, at 230, and requires consideration of "the characteristics of the accused [in addition to] the details of the interrogation," *id.*, at 226.

Florida v. Bostick, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991), established the framework for determining [***257] whether the bus passengers were seized in the constitutional sense. In that case, we rejected the position that police questioning of bus passengers was a *per se* seizure, and held instead that the issue of seizure was to be resolved under an objective test considering all circumstances: whether a reasonable passenger would have felt "free to decline the officers' requests or otherwise terminate the encounter," *id.*, at 436. We thus applied to a bus passenger the more general criterion, whether the person questioned was free "to ignore the police presence and go about his business," *id.*, at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 108 S. Ct. 1975 (1988)).

Before applying the standard in this case, it may be worth getting some perspective from different sets of facts. A perfect example of police conduct that supports no colorable claim of seizure is the act of an officer who simply goes up to a pedestrian on the street and asks him a question. See *Royer*, 460 U.S. at 497; see *id.*, at 523, n. 3 (REHNQUIST, J., dissenting). A pair of officers questioning a pedestrian, [*210] without more, would presumably support the same conclusion. Now consider three officers, one of whom stands behind the pedestrian, another at his side toward the open sidewalk, with the third addressing questions to the pedestrian a foot or two from his face. Finally, consider the same scene in a narrow alley. On such barebones facts, one may not be able to say a seizure occurred, even in the last case, but one can say without qualification that the atmosphere of the encounters differed significantly from the first to the last examples. In the final instance there is every reason to believe that the pedestrian would have understood, to his considerable discomfort, what Justice Stewart described as the "threatening presence of several officers," *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (opinion of Stewart, J.). The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of

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immediate power is unmistakable. We all understand this, as well as we understand that a display of power rising to Justice Stewart's "threatening" level may overbear a normal person's ability to act freely, even in the absence of explicit commands or the formalities of detention. As common as this understanding is, however, there is little sign of it in the Court's opinion. My own understanding of the relevant facts and their significance follows.

When the bus in question made its scheduled stop in Tallahassee, the passengers were required to disembark while the vehicle was cleaned and refueled. App. 104. When the passengers returned, they gave their tickets to the driver, who kept them and then left himself, after giving three police officers permission to board the bus in his absence. *Id.*, at 77-78. Although they were not in uniform, the [**2116] officers displayed badges and identified themselves as police. One stationed himself in the driver's seat by the door at the front, facing back to observe the passengers. The two others went to the rear, from which they worked their [***258] way forward, [*211] with one of them speaking to passengers, the other backing him up. *Id.*, at 47-48. They necessarily addressed the passengers at very close range; the aisle was only fifteen inches wide, and each seat only eighteen. n2 The quarters were cramped further by the overhead rack, nineteen inches above the top of the passenger seats. The passenger by the window could not have stood up straight, *id.*, at 55, and the face of the nearest officer was only a foot or eighteen inches from the face of the nearest passenger being addressed, *id.*, at 57. During the exchanges, the officers looked down, and the passengers had to look up if they were to face the police. The officer asking the questions spoke quietly. He prefaced his requests for permission to search luggage and do a body patdown by identifying himself by name as a police investigator "conducting bus interdiction" and saying, "We would like for your cooperation. Do you have any luggage on the bus?" *Id.*, at 82.

n2 The figures are from a Lodging filed by respondents (available in Clerk of Court's case file). The Government does not dispute their accuracy.

Thus, for reasons unexplained, the driver with the tickets entitling the passengers to travel had yielded his custody of the bus and its seated travelers to three police officers, whose authority apparently superseded the driver's own. The officers took control of the entire passenger compartment, one stationed at the door keeping surveillance of all the occupants, the others

working forward from the back. With one officer right behind him and the other one forward, a third officer accosted each passenger at quarters extremely close and so cramped that as many as half the passengers could not even have stood to face the speaker. None was asked whether he was willing to converse with the police or to take part in the enquiry. Instead the officer said the police were "conducting bus interdiction," in the course of which they "would like . . . cooperation." *Ibid.* The reasonable inference was that the "interdiction" was not a consensual exercise, but one the police would carry out whatever [*212] the circumstances; that they would prefer "cooperation" but would not let the lack of it stand in their way. There was no contrary indication that day, since no passenger had refused the cooperation requested, and there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established by this introduction. Later requests to search prefaced with "Do you mind . . ." would naturally have been understood in the terms with which the encounter began.

It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one. It is neither here nor there that the interdiction was conducted by three officers, not one, as a safety precaution. See *id.*, at 47. The fact was that there were three, and when Brown and Drayton were called upon to respond, each one was presumably conscious of an officer in front watching, one at his side questioning him, and one behind for cover, in case he became unruly, [***259] perhaps, or "cooperation" was not forthcoming. The situation is much like the one in the alley, with civilians in close quarters, unable to move effectively, being told their cooperation is expected. While I am not prepared to say that no bus interrogation and search can pass the *Bostick* test without a warning that passengers are free to say no, the facts here surely required more from the officers than a quiet tone of voice. A [**2117] police officer who is certain to get his way has no need to shout.

It is true of course that the police testified that a bus passenger sometimes says no, App. 81, but that evidence does nothing to cast the facts here in a different light. We have no way of knowing the circumstances in which a passenger elsewhere refused a request; maybe that has happened only [*213] when the police have told passengers they had a right to refuse (as the officers sometimes advised them), *id.*, at 81-82. Nor is it fairly possible to see the facts of this case differently by recalling *INS v. Delgado*, 466 U.S. 210, 80 L. Ed. 2d 247,

104 S. Ct. 1758 (1984), as precedent. In that case, a majority of this Court found no seizure when a factory force was questioned by immigration officers, with an officer posted at every door leading from the workplace. *Id.*, at 219. Whether that opinion was well reasoned or not, the facts as the Court viewed them differed from the case here. *Delgado* considered an order granting summary judgment in favor of respondents, with the consequence that the Court was required to construe the record and all issues of fact favorably to the Immigration and Naturalization Service. See *id.*, at 214; *id.*, at 221 (STEVENS, J., concurring). The Court therefore emphasized that even after "the surveys were initiated, the employees were about their ordinary business, operating machinery and performing other job assignments." *Id.*, at 218. In this case, however, Brown and Drayton were seemingly pinned-in by the officers and the customary course of events was stopped flat. The bus was going nowhere, and with one officer in the driver's seat, it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him.

In any event, I am less concerned to parse this case against *Delgado* than to apply *Bostick's* totality of circumstances test, and to ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter.

In my view the answer is clear. The Court's contrary conclusion tells me that the majority cannot see what Justice Stewart saw, and I respectfully dissent.

REFERENCES: Return To Full Text Opinion

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68 Am Jur 2d, Searches and Seizures 18, 55, 89, 136

USCS, Constitution, Amendment 4

L Ed Digest, Search and Seizure 2.3, 14

L Ed Index, Buses; Drugs and Narcotics; Interrogation;
Search and Seizure

Annotation References:

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent--
Supreme Court cases. 111 L Ed 2d 850.

What constitutes "seizure" within the meaning of
Federal Constitution's Fourth Amendment--Supreme Court cases. 100 L Ed 2d 981.

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Exhibit H

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August 17, 2009

U.S. Customs and Border Protection
FOIA Appeals
Policy and Litigation Branch
799 9th Street NW -5th Floor
Washington, DC 20229-1179

Re: 2009F8709

Dear Sir or Madam:

This letter is an appeal of the withholding of information responsive to request 2009F8709 and the failure to search adequately for records that are responsive to this request.

1. Scope of the request:

The request asked for the following records:

1. Copies of all I-213 forms issued for persons arrested on Amtrak trains by Customs and Border Protection (CBP) officers operating out of the Rochester Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
2. The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was "Over 1 Year."
3. The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was described as being as period less than one year.

4. The total number of persons who were arrested by officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
5. Any documents that explain the meaning of the code TCP 518.3 on the I-213 under the box labeled "Method of Location/Apprehension."
6. Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code.
7. Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 under the box labeled "Status When Found."
8. Any documents that list other possible phrases that could be filled in under "Status When Found" along with a description of the meaning of each phrase.
9. Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Buffalo Sector were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
10. Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Rochester Station were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
11. Performance review standards for CBP officers operating in the Buffalo Sector for the years 2003, 2004, 2005, 2006, 2007 and 2008.
12. Performance review standards for CBP officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
13. All training materials addressing racial profiling.
14. All training materials that pertain to the conduct of CBP officers on Amtrak trains.
15. Any other reports that contain information about the persons arrested on Amtrak trains for the years 2003, 2004, 2005, 2006, 2007 and 2008.
16. Any agreements between CBP and Amtrak.
17. Any materials concerning the standards which apply to the conduct of CBP officers at the border.
18. Any materials concerning the standards which apply to the conduct of CBP officers in the interior of the United States.

2. Response to the request:

In a response dated July 22, 2009, which is attached to this appeal, the agency stated that it had identified 81 pages. Fifty pages were withheld in their entirety. The agency claimed exemptions for these fifty pages under exemptions (b)(2)(high), (b)(2)low, (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). The agency also claimed that they have a document from the Department of Homeland Security (DHS) and the U.S. Department of Justice (DOJ) which they are prohibited from releasing.

Fifteen pages were released, with certain information within these pages withheld pursuant to (b)(2)(high), (b)(2)low, (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). These fifteen pages included: a copy of the Supreme Court Case, *U.S. v. Drayton*, 536 U.S. 194 (2002), a memorandum dated August 25, 2004, entitled "Implementing Secretary's Policy on the Use of Race or Ethnicity in Law Enforcement Activities", a memorandum dated February 2, 2005, entitled "Race and Neutrality in Law Enforcement," and a three page document in which the first words are "Buffalo Sector Apps for FY 2003-FY 2008" that demonstrates the number of arrests for that five year period but has most of the other identifying information redacted (including the method of apprehension, the total officer hours spent on enforcement, the employment status of individuals apprehended, and the number of individuals found in travel) under claimed exemptions. This last document is numbered in a way that corresponds to the questions in our request, but begins in the middle of the answer to question 4 and concludes with information treated to question 8. This document does not include copies of the underlying agency records that would be responsive to the request.

Additionally, the agency fails to explain the withholding of the other pages identified in their request. A search of CBP records apparently produced 81 pages, 15 of which are partially released, and 50 of which they claim are withheld in their entirety. This is a total of 65 pages. The agency has failed to explain what has become of the other 16 pages apparently identified by CBP.

3. Failure to Search for Responsive Documents

"It is elementary that an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The response to this request does not offer any explanation of the nature of the search performed, but given the scope of the request and the sparse set of documents identified, it is plain that any search was woefully inadequate.

It is implausible that the documents identified in the search constitute the full range of documents responsive to the request. The request sought records related to Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspections of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector. Based on your statistics, it is apparent that thousands of individuals have been apprehended along the northern border of the

United States, a number which has increased fivefold since 2003. Given that thousands of arrests have occurred, and that the number of arrests has increased significantly over the past five years, it stretches the imagination to believe that only 81 pages of documents are at all relevant to this operation. This is clearly a very large scale operation which has grown significantly over the past several years. It is simply not plausible that there are only 81 pages of documents relevant to this significant operation.

With regards to numbers 1-3 of the records sought, noted above in Section 1 "Scope of the Request", the request specifically asked for all I-213 forms issued for persons arrested on Amtrak trains, redacted only to exclude the names and A-numbers of such individuals. Not one I-213 form was included in the response, although the number of I-213 forms issued no doubt reaches the thousands. The response also failed to answer the questions posed regarding the summary statistics. The request specifically asked for statistics regarding arrests of individuals where it was noted on their I-213 form that their length of time illegally in the United States was over one year and statistics regarding arrests of individuals where it was noted on their I-213 form that their length of time illegally in the United States was less than one year.

The response to the FOIA request also fails to clearly identify whether there are responsive records to the information sought. With regards to records sought 9-18, noted above in Section 1 "Scope of the Request", not only was no information provided regarding these records, but there was also a complete failure to identify whether such information or records in fact exists. We received neither a response to the information requested nor a statement indicating that there is or is not anything responsive to these requested records.

4. Failure of the Government to meet its burden of showing why claimed exemptions apply in this instance

The Government bears the burden of proving that any one of the exemptions they have cited applies in this case. The Government has not met its burden of proving that any of the claimed exemptions apply in the current case. The response to the FOIA request gives no explanation for why the information has been withheld. The response additionally lacks the basic identifying information necessary to evaluate whether any of the claimed exemptions are appropriate in the given case. Until basic identifying information is provided, the claimed exemptions are not appropriate.

5. Withholding of Documents Under Exemption 2.

Exemption 2 permits the withholding of documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). For exemption b(2) low classification, the information may be withheld if the material is of "no genuine public interest." *Massey v. F.B.I.*, 3 F.3d 620, 622 (2d Cir. 1993). For exemption b(2) high classification, the withheld information must be predominantly internal and its

disclosure must significantly risk circumvention of the law. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981)(en banc.)

The claimed exemption is not appropriate in this case. Basic factual information was withheld under Exemption 2, including the total officer hours spent on border and general enforcement, including the time spent on transportation checks, and the employment status of the individuals arrested. Additionally, information about individuals who were apprehended while in travel other than daily travel, within their own community or to and from work, has been withheld under Exemption 2. It is unclear how release of this basic information would risk circumvention under the law or why this information is privileged.

The information is also clearly within the public interest. Given that some of the very limited information released indicates that the scale of the operations and enforcement along the northern border of the United States has increased exponentially in the past few years, both citizens and non-citizens alike have an interest in knowing what type of enforcement is occurring within the interior of the United States.

6. Withholding of Documents under Exemption 5:

Exemption 5 allows the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

The agency claims that they have a document from DHS and DOJ that they are prohibited from releasing. At the very least, we request a description of this document, and all other documents withheld under Exemption 5, that are currently being withheld and the basis for withholding the documentation so that we may better assess whether the withholding of this document is appropriate in this case.

7. Withholding of Documents under Exemption 6 AND 7(C):

Exemption 6 permits the government to withhold information contained in "personnel and medical files and similar files" when the disclosure of such information "would clearly constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) provides protection for "records compiled for law enforcement purposes" where their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The claimed exemption is not appropriate in this case. When determining whether the claimed exemption is appropriate in any given cases, generally a balancing test of the government employee's privacy interest against the public's interest in disclosure is appropriate. The balancing test includes factors such as "(1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the

employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature.” *Perlman v. Dep’t of Justice*, 312 F.3d 100, 107 (2d Cir. 2002), *vacated by* 541 U.S. 970 (2004), *reinstated on remand*, 380 F.3d 110 (2d. Cir. 2004). In this case, the request seeks information that is relevant to the public debate about CBNP’s train operations and the use of racial profiling as part of those operations. In this context, the factors listed above weigh heavily towards disclosure of the names of personnel. This information sought could shed light on government activity, including racial profiling. Furthermore the information sought is solely related to job function. Finally, there is no other way in which the public can obtain this information. As a result, the factors weigh in favor of disclosure of the names of DHS personnel.

8. Withholding of Documents under Exemption 7(E)

Exemption 7(E) is a limited exemption that allows agencies to withhold information if release would “disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(7)(E). This exemption may not be asserted to withhold “routine techniques and procedures already well-known to the public, such as ballistic tests, fingerprinting, and other scientific tests commonly known.” *Davin v. U.S. Dept. of Justice*, 60 F.3d 1043 (3d Cir. 1995) (*citing Ferri*, 645 F.2d at 1224 (*citing* H.R. Conf. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6285, 6291)).

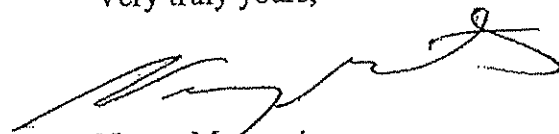
As noted above, the government has the burden of establishing that releasing the information would risk circumvention of the law. Since the response fails to identify which information has been withheld, it is impossible to determine whether there is any support for such claim. Until a specific finding has been made, the claimed exemption is not appropriate.

It should be further noted that President Barack Obama has issued a Memorandum instructing that agencies not frivolously withheld information that is within the public interest. This Memorandum states that “all agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). Additionally, Attorney General Eric Holder has issued guidelines instructing “all executive branch departments and agencies to apply a presumption of openness when administering the FOIA.” Press Release, Dept. of Justice, *Attorney General Issues New FOIA Guidelines to Favor Disclosure and Transparency* (Mar. 19, 2009).

The response that has been received thus far in connection with our request clearly does not adhere to these new guidelines for FOIA requests. We therefore look

forward to a timely response to our appeal and to receiving further documentation once a more thorough search has been completed.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Nancy Morawetz', with a stylized flourish at the end.

Nancy Morawetz
Supervising Attorney

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 6th FLOOR, NEW YORK, NY 10012
TEL: (212) 998-6430 - FAX: (212) 995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

CARLY LEINHEISER
MARIBEL HERNANDEZ
Legal Interns

February 26, 2009

U.S. Customs and Border Protection
Mint Annex Building
Attn: FOIA Division
799 9th St., NW
Washington, DC 20229

Re: Request for Customs and Border Protection Performance Standards, Regulations, Training Guidelines and Statistics Related to the Inspection of Persons Traveling on Amtrak Trains in the Rochester Station and in the Buffalo Sector

Dear Sir or Madam:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, and on behalf of the Immigrant Rights Clinic of Washington Square Legal Services, Inc., we request a copy of the following records:

- (1) Copies of all I-213 forms issued for persons arrested on Amtrak trains by Customs and Border Protection (CBP) officers operating out of the Rochester Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (2) The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was "Over 1 Year."
- (3) The number of persons who were arrested by CBP officers operating out of the Rochester Station for whom I-213s were issued on which it was noted that their "Length of Time Illegally in the United States" was described as being as period less than one year.
- (4) The total number of persons who were arrested by officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (5) Any documents that explain the meaning of the code TCP 518.3 on the I-213 under the box labeled "Method of Location/Apprehension."
- (6) Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code.
- (7) Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 under the box labeled "Status When Found."
- (8) Any documents that list other possible phrases that could be filled in under "Status When Found" along with a description of the meaning of each phrase.

- (9) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Buffalo Sector were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (10) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that CBP officers operating in the Rochester Station were required to meet, for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (11) Performance review standards for CBP officers operating in the Buffalo Sector for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (12) Performance review standards for CBP officers operating out of the Rochester Station for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (13) All training materials addressing racial profiling.
- (14) All training materials that pertain to the conduct of CBP officers on Amtrak trains.
- (15) Any other reports that contain information about the persons arrested on Amtrak trains for the years 2003, 2004, 2005, 2006, 2007 and 2008.
- (16) Any agreements between CBP and Amtrak.
- (17) Any materials concerning the standards that apply to the conduct of CBP officers at the border.
- (18) Any materials concerning the standards that apply to the conduct of CBP officers in the interior of the United States.

Requestors request that any records that exist in electronic form be provided in electronic format on a compact disk. If any of the requested records or information is not kept in a succinct format, we request the opportunity to view the documents in your offices.

We agree to pay search, duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). A fee waiver would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (discussing that Congress intended the FOIA to be construed broadly to favor fee waivers for noncommercial requests). The Washington Square Legal Services, Inc. is a nonprofit organization representing indigent clients.

On January 21, 2009, President Barack Obama issued a Memorandum regarding the FOIA in which he stated that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President's Memorandum underscores the importance of prompt and full disclosure of documents requested pursuant to the FOIA. Agencies must make every effort to disclose requested documents and not frivolously withhold information that could be released to the public without compromising a significant government interest. We therefore request a full and complete response to our request.

The requested information is in the public interest because it will contribute significantly to the public understanding of CBP's operations, activities and inspections in the interior of the United States that affect persons living and traveling inside the United States and it is not primarily in the commercial interest of the requester. There is currently great public interest in this subject, as evidenced by the recent publication of numerous newspaper articles. (See, e.g., John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Central NY News, July 5, 2008 and Jennifer Lee, *A Protest Over Bus and Train Citizenship Checks*, NY Times, April 2, 2008.) This information is also of interest to persons who were placed in removal proceedings as a result of these inspections.

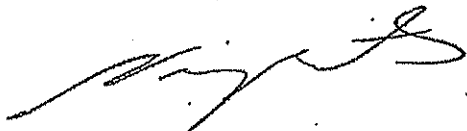
We are requesting this information in connection with our representation of a client who is in removal proceedings and in anticipation of an upcoming hearing at 26 Federal Plaza, New York, NY. We therefore respectfully request expedited processing of this request.

Please contact us at (212) 998-6430 with any questions. Please supply all records to:

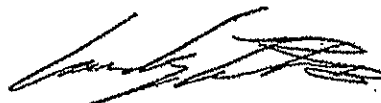
Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Thank you for your prompt attention to this matter.


Very truly yours,



Nancy Morawetz
Supervising Attorney



Carly Leinheiser
Law Student Intern



Marijel Hernández
Law Student Intern



**U.S. Customs and
Border Protection**

JUL 22 2009

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: 2009F8709

Dear Ms. Morawetz:

This is the final response to your Freedom of Information Act (FOIA) requests to U.S. Customs and Border Protection, dated February 26, 2009. You are seeking records pertaining to apprehensions on Amtrak trains by Border Patrol Agents and related documents to the I-213.

A search of the Office of Border Patrol for documents responsive to your request produced a total of 81 pages. Of those pages, we have determined that 15 pages are partially released, and 50 pages are withheld in their entirety pursuant to Title 5 U.S.C. §552 (b)(2)(high), (b)(2)(low), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E); FOIA Exemptions 2 (high), 2(low), 5, 6, b7(C), b7(E). Please be advised we have a document from the Department of Homeland Security (DHS) and the U.S. Department of Justice (DOJ) which we are prohibited from releasing to you. We have taken the liberty of referring this documents to DHS and DOJ for review and direct response to you.

Enclosed is a CD containing 15 pages with certain information withheld pursuant to 5 U.S.C. §552 (b)(2)(high), (b)(2)(low), (b)(6), (b)(7)(C), and (b)(7)(E). Explanations used in the withholding are described below.

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

FOIA Exemption 2(low) protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy.

FOIA Exemption b7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, we have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

You have a right to appeal our withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: U.S. Customs and Border Protection, FOIA Appeals, Policy and Litigation Branch, 799 9th Street NW- 5th Floor, Washington, DC 20229-1179, following the procedures outlined in the Department of Homeland Security (DHS) regulations at 6 C.F.R. §5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provision of the FOIA allow us to recover part of the cost of complying with your request. In this instance, we have taken the liberty of waiving the applicable fees. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to 2009F8709. This office can be reached at (202) 325-0150.

Sincerely,

A handwritten signature in cursive script that reads "Mark Hanson".

Mark Hanson

Director

FOIA Division

Office of International Trade

Enclosure

Exhibit I



U.S. Department of Justice

Civil Rights Division

NDH:TCG:ANF
09-00439-F

Freedom of Information/Privacy Acts
Branch - NALC
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

AUG 21 2009

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Dear Ms. Morawetz:

This is in further response to your Freedom of Information Act request received by the Department of Justice Civil Rights Division August 18, 2009, seeking information on performance standards, regulations, training guidelines and statistics related to the inspection of persons traveling on Amtrak trains in the Rochester Station and in the Buffalo Sector.

In searching its files for documents responsive to your Freedom of Information Act request, the U.S. Customs and Border Protection located a "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" which originated with the Civil Rights Division. Pursuant to Department of Justice regulations 28 C.F.R. § 16.1 *et seq.*, this document was referred to the Civil Rights Division, as the originating component, for review and release determination.

After review of the documents responsive to your request, I have determined that the enclosed fifteen page document may be released to you in its entirety.

I hope the Civil Rights Division has been of some assistance to you in this matter.

Sincerely,

Nelson D. Hermilla
Nelson D. Hermilla, Chief

Freedom of Information/Privacy Acts Branch
Civil Rights Division

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United States Department of Justice

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GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES

U.S. Department of Justice
Civil Rights Division

GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES

June 2003

INTRODUCTION AND EXECUTIVE SUMMARY

In his February 27, 2001, Address to a Joint Session of Congress, President George W. Bush declared that racial profiling is "wrong and we will end it in America." He directed the Attorney General to review the use by Federal law enforcement authorities of race as a factor in conducting stops, searches and other law enforcement investigative procedures. The Attorney General, in turn, instructed the Civil Rights Division to develop guidance for Federal officials to ensure an end to racial profiling in law enforcement.

"Racial profiling" at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.

Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.⁽¹⁾

The use of race as the basis for law enforcement decision-making clearly has a terrible cost, both to the individuals who suffer invidious discrimination and to the Nation, whose goal of "liberty and justice for all" recedes with every act of such discrimination. For this reason, this guidance in many cases imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires.⁽²⁾ This guidance prohibits racial profiling in law enforcement practices without hindering the important work of our Nation's public safety officials, particularly the intensified anti-terrorism efforts precipitated by the events of September 11, 2001.

I. Traditional Law Enforcement Activities. Two standards in combination should guide use by Federal law enforcement authorities of race or ethnicity in law enforcement activities:

- In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.
- In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.

II. National Security and Border Integrity. The above standards do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders,⁽³⁾ to which the following applies:

- In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

Any questions arising under these standards should be directed to the Department of Justice.

THE CONSTITUTIONAL FRAMEWORK

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v.*

United States, 517 U.S. 806, 813 (1996). Thus, for example, the decision of federal prosecutors "whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" ⁽⁴⁾ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). The same is true of Federal law enforcement officers. Federal courts repeatedly have held that any general policy of "utiliz[ing] impermissible racial classifications in determining whom to stop, detain, and search" would violate the Equal Protection Clause. *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001). As the Sixth Circuit has explained, "[i]f law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997). "A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden." *Id.* at 354.

As the Supreme Court has held, this constitutional prohibition against selective enforcement of the law based on race "draw[s] on 'ordinary equal protection standards.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Thus, impermissible selective enforcement based on race occurs when the challenged policy has "a discriminatory effect and . . . was motivated by a discriminatory purpose." *Id.* (quoting *Wayte*, 470 U.S. at 608). ⁽⁵⁾ Put simply, "to the extent that race is used as a proxy" for criminality, "a racial stereotype requiring strict scrutiny is in operation." *Cf. Bush v. Vera*, 517 U.S. at 968 (plurality).

I. GUIDANCE FOR FEDERAL OFFICIALS ENGAGED IN LAW ENFORCEMENT ACTIVITIES

A. Routine or Spontaneous Activities in Domestic Law Enforcement

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.

Federal law enforcement agencies and officers sometimes engage in law enforcement activities, such as traffic and foot patrols, that generally do not involve either the ongoing investigation of specific criminal activities or the prevention of

catastrophic events or harm to the national security. Rather, their activities are typified by spontaneous action in response to the activities of individuals whom they happen to encounter in the course of their patrols and about whom they have no information other than their observations. These general enforcement responsibilities should be carried out without any consideration of race or ethnicity.

- **Example:** While parked by the side of the George Washington Parkway, a Park Police Officer notices that nearly all vehicles on the road are exceeding the posted speed limit. Although each such vehicle is committing an infraction that would legally justify a stop, the officer may not use race or ethnicity as a factor in deciding which motorists to pull over. Likewise, the officer may not use race or ethnicity in deciding which detained motorists to ask to consent to a search of their vehicles.

Some have argued that overall discrepancies in certain crime rates among racial groups could justify using race as a factor in general traffic enforcement activities and would produce a greater number of arrests for non-traffic offenses (e.g., narcotics trafficking). We emphatically reject this view. The President has made clear his concern that racial profiling is morally wrong and inconsistent with our core values and principles of fairness and justice. Even if there were overall statistical evidence of differential rates of commission of certain offenses among particular races, the affirmative use of such generalized notions by federal law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping. It casts a pall of suspicion over every member of certain racial and ethnic groups without regard to the specific circumstances of a particular investigation or crime, and it offends the dignity of the individual improperly targeted. Whatever the motivation, it is patently unacceptable and thus prohibited under this guidance for Federal law enforcement officers to act on the belief that race or ethnicity signals a higher risk of criminality. This is the core of "racial profiling" and it must not occur.

The situation is different when an officer has specific information, based on trustworthy sources, to "be on the lookout" for specific individuals identified at least in part by race or ethnicity. In such

circumstances, the officer is not acting based on a generalized assumption about persons of different races; rather, the officer is helping locate specific individuals previously identified as involved in crime.

- *Example:* While parked by the side of the George Washington Parkway, a Park Police Officer receives an "All Points Bulletin" to be on the look-out for a fleeing bank robbery suspect, a man of a particular race and particular hair color in his 30s driving a blue automobile. The Officer may use this description, including the race of the particular suspect, in deciding which speeding motorists to pull over.

B. Law Enforcement Activities Related to Specific Investigations

In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.

As noted above, there are circumstances in which law enforcement activities relating to particular identified criminal incidents, schemes or enterprises may involve consideration of personal identifying characteristics of potential suspects, including age, sex, ethnicity or race. Common sense dictates that when a victim describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race. Similarly, in conducting an ongoing investigation into a specific criminal organization whose membership has been identified as being overwhelmingly of one ethnicity, law enforcement should not be expected to disregard such facts in pursuing investigative leads into the organization's activities.

Reliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity. The rationale underlying this concept carefully limits its reach. In order to qualify as a legitimate investigative lead, the following must be true:

- The information must be relevant to the locality or time frame of the criminal activity;
- The information must be trustworthy;
- The information concerning identifying characteristics must be tied to a particular criminal incident, a particular criminal scheme, or a particular criminal organization.

The following policy statements more fully explain these principles.

1. Authorities May Never Rely on Generalized Stereotypes, But May Rely Only on Specific Race- or Ethnicity-Based Information

This standard categorically bars the use of generalized assumptions based on race.

- **Example:** In the course of investigating an auto theft in a federal park, law enforcement authorities could not properly choose to target individuals of a particular race as suspects, based on a generalized assumption that those individuals are more likely to commit crimes.

This bar extends to the use of race-neutral pretexts as an excuse to target minorities. Federal law enforcement may not use such pretexts. This prohibition extends to the use of other, facially race-neutral factors as a proxy for overtly targeting persons of a certain race or ethnicity. This concern arises most frequently when aggressive law enforcement efforts are focused on "high crime areas." The issue is ultimately one of motivation and evidence; certain seemingly race-based efforts, if properly supported by reliable, empirical data, are in fact race-

neutral.

- **Example:** In connection with a new initiative to increase drug arrests, local authorities begin aggressively enforcing speeding, traffic, and other public area laws in a neighborhood predominantly occupied by people of a single race. The choice of neighborhood was not based on the number of 911 calls, number of arrests, or other pertinent reporting data specific to that area, but only on the general assumption that more drug-related crime occurs in that neighborhood because of its racial composition. This effort would be improper because it is based on generalized stereotypes.

- **Example:** Authorities seeking to increase drug arrests use tracking software to plot out where, if anywhere, drug arrests are concentrated in a particular city, and discover that the clear majority of drug arrests occur in particular precincts that happen to be neighborhoods predominantly occupied by people of a single race. So long as they are not motivated by racial animus, authorities can properly decide to enforce all laws aggressively in that area, including less serious quality of life ordinances, as a means of increasing drug-related arrests. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("We must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited

to specific, circumscribed locations where particular crimes occur with unusual regularity.").

By contrast, where authorities are investigating a crime and have received *specific information* that the suspect is of a certain race (e.g., direct observations by the victim or other witnesses), authorities may reasonably use that information, even if it is the only descriptive information available. In such an instance, it is the victim or other witness making the racial classification, and federal authorities may use reliable incident-specific identifying information to apprehend criminal suspects. Agencies and departments, however, must use caution in the rare instance in which a suspect's race is the only available information. Although the use of that information may not be unconstitutional, broad targeting of discrete racial or ethnic groups always raises serious fairness concerns.

- **Example:** The victim of an assault at a local university describes her assailant as a young male of a particular race with a cut on his right hand. The investigation focuses on whether any students at the university fit the victim's description. Here investigators are properly relying on a description given by the victim, part of which included the assailant's race. Although the ensuing investigation affects students of a particular race, that investigation is not undertaken with a discriminatory purpose. Thus use of race as a factor in the investigation, in this instance, is permissible.

2. The Information Must be Relevant to the Locality or Time Frame

Any information concerning the race of persons who may be involved in specific criminal activities must be locally or temporally relevant.

- **Example:** DEA issues an intelligence report that indicates that a drug ring whose members are known to be predominantly of a particular race or ethnicity is trafficking drugs in Charleston, SC. An agent operating in Los Angeles reads this intelligence report. In the absence of information establishing that this intelligence is also applicable in Southern California, the agent may not use ethnicity as a factor in making local law enforcement decisions about individuals who are of the particular race or ethnicity that is predominant in the Charleston drug ring.

3. The Information Must be Trustworthy

Where the information concerning potential criminal activity is unreliable or is too generalized and unspecific, use of racial descriptions is prohibited.

- **Example:** ATF special agents receive an uncorroborated anonymous tip that a male of a particular race will purchase an illegal firearm at a Greyhound bus terminal in a racially diverse North Philadelphia neighborhood. Although agents surveilling the location are free to monitor the movements of whomever they choose, the agents are prohibited from using the tip information, without more, to target any males of that race in the bus terminal. *Cf. Morgan v. Woessner*, 997 F.2d 1244, 1254 (9th Cir. 1993) (finding no reasonable basis for suspicion where tip "made all black men suspect"). The information is neither sufficiently reliable nor sufficiently specific.

4. Race- or Ethnicity-Based Information Must Always be Specific to Particular Suspects or Incidents, or Ongoing Criminal Activities, Schemes, or

Enterprises

These standards contemplate the appropriate use of both "suspect-specific" and "incident-specific" information. As noted above, where a crime has occurred and authorities have eyewitness accounts including the race, ethnicity, or other distinguishing characteristics of the perpetrator, that information may be used. Federal authorities may also use reliable, locally relevant information linking persons of a certain race or ethnicity to a particular incident, unlawful scheme, or ongoing criminal enterprise—even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident or ongoing criminal activity will point strongly to a perpetrator of a certain race, even though authorities lack an eyewitness account

- *Example:* The FBI is investigating the murder of a known gang member and has information that the shooter is a member of a rival gang. The FBI knows that the members of the rival gang are exclusively members of a certain ethnicity. This information, however, is not suspect-specific because there is no description of the particular assailant. But because authorities have reliable, locally relevant information linking a rival group with a distinctive ethnic character to the murder, Federal law enforcement officers could properly consider ethnicity in conjunction with other appropriate factors in the course of conducting their investigation. Agents could properly decide to focus on persons dressed in a manner consistent with gang activity, but ignore persons dressed in that manner who do not appear to be members of that particular ethnicity.

It is critical, however, that there be reliable information that ties persons of a particular description

to a specific criminal incident, ongoing criminal activity, or particular criminal organization. Otherwise, any use of race runs the risk of descending into reliance upon prohibited generalized stereotypes.

- *Example:* While investigating a car theft ring that dismantles cars and ships the parts for sale in other states, the FBI is informed by local authorities that it is common knowledge locally that most car thefts in that area are committed by individuals of a particular race. In this example, although the source (local police) is trustworthy, and the information potentially verifiable with reference to arrest statistics, there is no particular incident- or scheme- specific information linking individuals of that race to the particular interstate ring the FBI is investigating. Thus, without more, agents could not use ethnicity as a factor in making law enforcement decisions in this investigation.

Note that these standards allow the use of reliable identifying information about planned future crimes. Where federal authorities receive a credible tip from a reliable informant regarding a planned crime that has not yet occurred, authorities may use this information under the same restrictions applying to information obtained regarding a past incident. A prohibition on the use of reliable prospective information would severely hamper law enforcement efforts by essentially compelling authorities to wait for crimes to occur, instead of taking pro-active measures to prevent crimes from happening.

- *Example:* While investigating a specific drug trafficking operation, DEA special agents learn that a particular methamphetamine distribution ring is

manufacturing the drug in California, and plans to have couriers pick up shipments at the Sacramento, California airport and drive the drugs back to Oklahoma for distribution. The agents also receive trustworthy information that the distribution ring has specifically chosen to hire older couples of a particular race to act as the couriers. DEA agents may properly target older couples of that particular race driving vehicles with indicia such as Oklahoma plates near the Sacramento airport.

II. GUIDANCE FOR FEDERAL OFFICIALS ENGAGED IN LAW ENFORCEMENT ACTIVITIES INVOLVING THREATS TO NATIONAL SECURITY OR THE INTEGRITY OF THE NATION'S BORDERS

In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

Since the terrorist attacks on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution. Similarly, because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory

and constitutional standards. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).⁽⁶⁾ This policy will honor the rule of law and promote vigorous protection of our national security.

As the Supreme Court has stated, all racial classifications by a governmental actor are subject to the "strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224-25 (1995). The application of strict scrutiny is of necessity a fact-intensive process. *Id.* at 236. Thus, the legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination. Indeed, the very purpose of the strict scrutiny test is to "smoke out" illegitimate use of race, *Adarand*, 515 U.S. at 226 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)), and law enforcement strategies not actually premised on *bona fide* national security or border integrity interests therefore will not stand.

In sum, constitutional provisions limiting government action on the basis of race are wide-ranging and provide substantial protections at every step of the investigative and judicial process. Accordingly, and as illustrated below, when addressing matters of national security, border integrity, or the possible catastrophic loss of life, existing legal and constitutional standards are an appropriate guide for Federal law enforcement officers.

- **Example:** The FBI receives reliable information that persons affiliated with a foreign ethnic insurgent group intend to use suicide bombers to assassinate that country's president and his entire entourage during an official visit to the United States. Federal law enforcement may appropriately focus investigative attention on identifying members of that ethnic insurgent group who may be present and active in the United States and who, based on other available information, might conceivably be involved in planning some such attack during the state visit.
- **Example:** U.S. intelligence sources report that terrorists from a particular ethnic group are planning to use commercial jetliners as weapons by hijacking them at an airport in California during the next week. Before allowing men of that ethnic group to board commercial airplanes in California airports during the next week, Transportation Security Administration personnel, and other federal and state authorities, may subject them to heightened scrutiny.

Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or even to a particular identified scheme.

Of course, as in the example below, reliance solely upon generalized stereotypes is forbidden.

- *Example:* At the security entrance to a Federal courthouse, a man who appears to be of a particular ethnicity properly submits his briefcase for x-ray screening and passes through the metal detector. The inspection of the briefcase reveals nothing amiss, the man does not activate the metal detector, and there is nothing suspicious about his activities or appearance. In the absence of any threat warning, the federal security screener may not order the man to undergo a further inspection solely because he appears to be of a particular ethnicity.

FOOTNOTES

1. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone.").

2. This guidance is intended only to improve the internal management of the executive branch. It is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial or any other proceeding.

3. This guidance document does not apply to U.S. military, intelligence, protective or diplomatic activities conducted consistent with the Constitution and applicable Federal law.

4. These same principles do not necessarily apply to classifications based on alienage. For example, Congress, in the exercise of its broad powers over immigration, has enacted a number of provisions that apply only to aliens, and enforcement of such provisions properly entails consideration of a person's alien status.

5. Invidious discrimination is not necessarily present whenever there is a "disproportion" between the racial composition of the pool of persons prosecuted and the general public at large; rather, the focus must be the pool of "*similarly situated* individuals of a different race [who] were not prosecuted." *Armstrong*, 517 U.S. at 465 (emphasis added). "[R]acial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality).

6. Moreover, as in the traditional law enforcement

context described in the second standard, *supra*, officials involved in homeland security may take into account specific, credible information about the descriptive characteristics of persons who are affiliated with identified organizations that are actively engaged in threatening the national security.

Updated July 25,
2008

U.S. Department of Justice
RT FOI/PA BRANCH
Washington, DC 20530
Official Business

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

AUG 25 2009

Exhibit J



Homeland Security

Privacy Office, Mail Stop 0655

September 11, 2009

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: **DHS/OS/PRIV 09-840**

Dear Ms. Morawetz:

This is the final response from this office to your February 26, 2009 Freedom of Information Act (FOIA) request, referred to the Department of Homeland Security (DHS) Privacy Office by Customs and Border Protection (CBP). In responding to your request seeking records pertaining to apprehensions on Amtrak trains by Border Patrol Agents and related documents to the I-213, CBP located documents under the purview of DHS. Your request was received in this office on July 22, 2009.

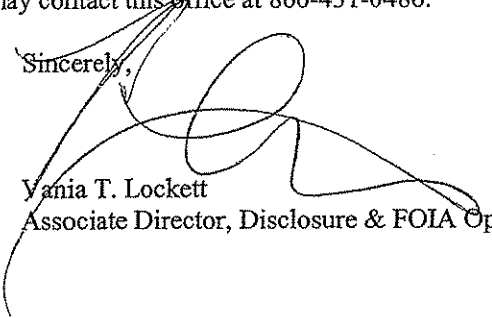
In our letter to you, dated July 29, 2009, we informed you that two documents were referred to our office; one of which we were reviewing for releasability and the other was available online at http://www.dhs.gov/xlibrary/assets/CRCL_MemoCommitmentRaceNeutrality_June04.pdf; Internet, accessed September 11, 2009.

We have completed the review of the second document, and I am granting your request under the FOIA, Title 5 U.S.C. § 552, as amended, and DHS' implementing regulations, 6 C.F.R. Chapter I and Part 5. After carefully reviewing the responsive document, consisting of 2 pages, I determined that it is appropriate for public release. The document is enclosed in its entirety; no deletions or exemptions have been claimed.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.

If you need to contact us about this request, please refer to **DHS/OS/PRIV 09-840**. Please refer to this identifier in any future correspondence. You may contact this office at 866-431-0486.

Sincerely,



Yania T. Lockett

Associate Director, Disclosure & FOIA Operations

Enclosure: As stated, 2 pages



Homeland Security

JUL 21 2004

MEMORANDUM TO: Commissioner Robert C. Bonner
Customs and Border Protection

Assistant Secretary Michael Garcia
Immigration and Customs Enforcement

Acting Administrator David Stone
Transportation Security Administration

Connie Patrick, Director
Federal Law Enforcement Training Center (FLETC)

James A. Williams, Director
U.S.-Visit

FROM: Under Secretary Asa Hutchinson
Border and Transportation Security

SUBJECT: Implementing Secretary's Policy on the Use of Race or Ethnicity in
Law Enforcement Activities

Preventing racial profiling in law enforcement is a priority mission of this Department. It is also a priority for me. The promise of equality before the law, regardless of race or ethnicity, is a touchstone of our Constitution and an expression of the best elements of our national character. Those of us who work in Federal law enforcement recognize that we are the guarantors of that promise.

The Secretary has issued the attached policy memorandum, titled "The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities." The memorandum directs all DHS components to adopt the Department of Justice Guidance Regarding the Use of Race in Federal Law Enforcement. The Secretary's memorandum also contains a brief policy statement which he has directed all components to include in policy handbooks, training manuals, and other component publications containing material relevant to the prevention of racial or ethnic profiling.

Please ensure that your components are in compliance with the Secretary's policy memorandum. In the immediate future, the Department's Office for Civil Rights and Civil Liberties will supply you with a training module that will give a basic overview of the

Department of Justice Guidance. However, over time, you will no doubt want to prepare more targeted and specific training on this matter. As you proceed, please work closely with BTS Policy and the Department's Office for Civil Rights and Civil Liberties to develop policies, procedures and training to fully implement and incorporate the Department of Justice Guidance in your operations.

As you may know, CBP has created extensive procedures for personnel to follow before engaging in an invasive personal search. These extensive and well considered procedures for personal searches should remain in place, and should serve as one model approach for components considering best practices for the prevention of racial and ethnic profiling.

As President Bush said, racial profiling "is wrong and we will end it in America." We are privileged to be at the forefront of that effort.

Attachment:

Policy Memorandum: "The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities"

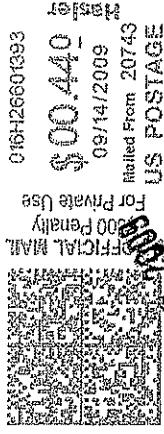
U.S. Department of Homeland Security

Privacy Office
Rosslyn, VA 22209



Homeland
Security

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012



1001261301 0025

Exhibit K



U.S. Customs and
Border Protection

OT:RR:FAPL
H074721

September 4, 2009

Ms. Nancy Morawetz
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Dear Ms. Morawetz:

This acknowledges receipt of your correspondence dated August 17, 2009, concerning certain incidents at or near the Rochester Amtrak train station and your FOIA appeal.

Your inquiry has been assigned to Cindy Owens. If it becomes necessary to contact us regarding this matter, you may call him/her at (202) 325-0114, or write to us at U.S. Customs and Border Protection, OT/Regulations & Rulings, FOIA Appeals, Policy & Litigation Branch, 799 9th Street, NW – 5th Floor, Washington, DC 20229-1179. In any further correspondence, please refer to the file number in the upper right corner of this letter.

Any Questions regarding substantive legal issues involved in your inquiry may be raised with the person to whom it is assigned. All questions regarding the priority or status of the processing should be raised with the undersigned.

Sincerely,

Shari Suzuki
49

Shari Suzuki, Chief
FOIA Appeals, Policy & Litigation Branch



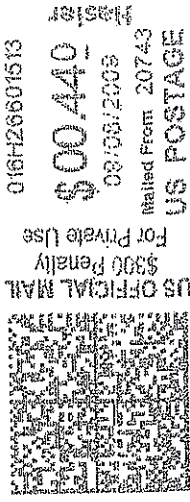
U.S. Customs and
Border Protection

1300 PENNSYLVANIA AVENUE, NW, MINT ANNEX
WASHINGTON, DC 20129

OT/ORR

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

SEP 11 2009



SEP 11 2009 SEP 11 2009

Ms. Nancy Morawetz
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Exhibit L

MODE = MEMORY TRANSMISSION

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END=SEP-25 18:03

FILE NO.=065

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FAX: 212-995-4031

FACSIMILE TRANSMITTAL

TO: Ms. Cindy Owens

FROM: Jeanette Markle and Alba Villa, Washington Square Legal Services

RE: 2009F8709

DATE: September 25, 2009

FAX: (202) 325-0152

PAGES: 5 pages (including cover)

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TEL: 212-998-6430
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NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

SEPTEMBER 25, 2009

VIA FACSIMILE

Ms. Cindy Owens
U.S. Customs and Border Protection
OT/Regulations & Rulings
FOIA Appeals, Policy & Litigation Branch
799 9th Street, NW -5th Floor
Washington, DC 20229-1179
Fax: (202) 325-0152

RE: 2009F8709

Dear Ms. Owens:

Thank you again for speaking with us last week about the above-referenced FOIA request dated February 26, 2009. Since you were unable to locate the produced documents we had questions about during the call, we are enclosing copies of these documents.

As you can see, these documents are numbered in a way that corresponds to the questions in our request, but begin in the middle of the answer to question 4 and conclude with information corresponding to question 8. These documents do not include copies of the underlying agency records that would be responsive to the request and appear to be missing pages before and after the segment with which we were provided.

Also, as we indicated in our conversation, we are interested in learning about how you keep your arrest statistics and the scope of the data in order to determine what additional data would be responsive to our request. (*See Buffalo Sector Apps for FY2003-FY2008 attached.*)

We look forward to hearing from you about this matter. We also hope to speak with you next week to follow up with you about the status of your inquiry to ICE regarding the possibility of isolating data contained the requested I-213s from the Enforce database in a more efficient manner.

Please let us know if you have any questions. You can reach us via email at jem531@nyu.edu.

Sincerely,

Jeanette Markle
Alba Villa

Buffalo Sector Apps for FY2003 - FY2008
Data Source: EID (unofficial)

| | APPS |
|--------|-------|
| FY2003 | 564 |
| FY2004 | 671 |
| FY2005 | 400 |
| FY2006 | 1,517 |
| FY2007 | 2,191 |
| FY2008 | 3,339 |

5) As per G-23 Reporting Procedures (G23.19-23.20 & 23.22.1) as outlined in AM 3.1.101

I. EWI/Status Violators (Line 518). This category relates solely to alien apprehension for violation of the terms of admission, remaining longer than permitted, or entry without inspection, including stowaways, landed crewmen who were ordered detained on board, etc (b) (2) & (b) (7)(E)

(b) (2) & (b) (7)(E) Line 518 is divided into the following subcategories:

1. 518.1: Convicted/Other
2. 518.2: Suspect/Referral
3. 518.3: Non-criminal

6) Method of Apprehension

409. Border Enforcement-Total Officer Hours (b) (2)

(b) (2)

409 A Patrol.

(b) (2)

(b) (2)

1. Border.

(b) (2)

(b) (2)

2. Interior

(b) (2)

(b) (2)

409 B Traffic check.

(b) (2)

(b) (2)

409 C Transportation Check

(b) (2)

(b) (2)

409 D Boat Patrol

(b) (2)

(b) (2)

409 E Air Patrol

(b) (2)

(b) (2)

409 F Crewman/Stowaway.

(b) (2)

(b) (2)

410. General Enforcement - Total Officer Hours.

(b) (2)

(b) (2)

410.A Employer Sanctions.

(b) (2)

(b) (2)

410.B Criminal Alien Program.

(b) (2)

(b) (2)

410.C Anti-smuggling.

(b) (2)

(b) (2)

7 and 8) Status When Found

H. Employment Status - Enter the number of aliens located in the following categories.

1. Column 21 - Heavy industry (b) (2)
(b) (2)

2. Column 22 (b) (2)
(b) (2)

3. Column 23 - Agriculture (b) (2)
(b) (2)

4. Column 24 - Construction (b) (2)
(b) (2)

5. Column 25 - Service (b) (2)
(b) (2)

6. Column 26 - Welfare (b) (2)
(b) (2)

7. Column 27 - Seeking employment (b) (2)
(b) (2)

I. Other -

1. Column 28 - Institution (b) (2)
(b) (2)

2. Column 29 - Travel - Enter the number of aliens found in travel. This means an alien found who is going from one point to another except in daily travel within his own community or to and from work (b) (2)
(b) (2)

Exhibit M

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FAX: 212-995-4031

FACSIMILE TRANSMITTAL

TO: Ms. Cindy Owens

FROM: Jeanette Markle and Alba Villa, Washington Square Legal Services

RE: 2009F8709

DATE: November 9, 2009

FAX: (202) 325-0152

PAGES: 2 pages (including cover)

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MODE = MEMORY TRANSMISSION

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END=NOV-09 14:21

FILE NO.=045

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| 001 | OK | # | 9120232501523453260 | 002/002 | 00:00:31 |

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- ***** - 1 212 995 4878- *****

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TEL: 212-998-6430
FAX: 212-995-4031

FACSIMILE TRANSMITTAL

TO: Ms. Cindy Owens
FROM: Jeanette Markle and Alba Villa, Washington Square Legal Services
RE: 2009F8709
DATE: November 9, 2009
FAX: (202) 325-0152
PAGES: 2 pages (including cover)

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WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 5TH FLOOR

NEW YORK, NEW YORK 10012

TEL: 212-998-6430

FAX: 212-995-4031

NANCY MORAWETZ

ALINA DAS

Supervising Attorneys

NOVEMBER 9, 2009

VIA FACSIMILE

Ms. Cindy Owens
U.S. Customs and Border Protection
OT/Regulations & Rulings
FOIA Appeals, Policy & Litigation Branch
799 9th Street, NW -5th Floor
Washington, DC 20229-1179
Fax: (202) 325-0152

RE: 2009F8709

Dear Ms. Owens:

I write to follow-up on the status of the above-referenced FOIA request dated February 26, 2009.

When we last spoke on October 1st, you estimated that you would be able to comprehensively review our request and provide responses to most of our inquiries in November. In our conversation with you on September 15th, you agreed to follow up on three matters in particular. We still await your responses on the following items: (1) how we might narrow our I-213 request given the technological limitations in manipulating the ENFORCE document database, (2) whether ICE would be capable of manipulating the ENFORCE database to respond to the I-213 request more efficiently, and (3) how your agency keeps arrest statistics and the scope of the data available beyond what has already been produced.

It has been more than eight months since we submitted our initial request and we are very eager to acquire the responsive documents as soon as possible. Please contact us at jem531@nyu.edu or (301) 343-9505 to provide us with an update on your review.

Sincerely,



Jeanette Markle
Alba Villa

Exhibit N

IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 SULLIVAN STREET
NEW YORK, NEW YORK 10012
TEL: 212-998-6430
FAX: 212-995-4031

FACSIMILE TRANSMITTAL

TO: Ms. Cindy Owens

FROM: Jeanette Markle and Alba Villa, Washington Square Legal Services

RE: 2009F8709

DATE: November 20, 2009

FAX: (202) 325-0152

PAGES: 2 pages (including cover)

Notice: The information contained in this facsimile is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the message to us at the above address via the U.S. Postal Service. We will gladly reimburse you for your expense. Thank you.

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THE CLINICAL EDUCATION PROGRAMS OF THE NEW YORK UNIVERSITY SCHOOL OF LAW

MODE = MEMORY TRANSMISSION

START=NOV-20 16:59

END=NOV-20 17:00

FILE NO.=229

| STN NO. | COMM. | ONE-TOUCH/ ABBR NO. | STATION NAME/TEL NO. | PAGES | DURATION |
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- ***** - 1 212 995 4878- *****

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NOVEMBER 20, 2009

Ms. Cindy Owens
U.S. Customs and Border Protection
OT/Regulations & Rulings
FOIA Appeals, Policy & Litigation Branch
799 9th Street, NW -5th Floor
Washington, DC 20229-1179

RE: 2009F8709

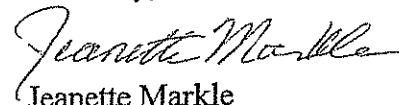
Dear Ms. Owens:

I write to memorialize our telephone conversation on or about November 12th regarding the above-referenced FOIA request dated February 26, 2009. My understanding from our conversation is that you hope to comprehensively review our request in November, which will include reviewing *de novo* both the appropriateness of the redactions of the records produced as well as reviewing whether all the responsive documents were gathered the first time. We also discussed your proposal that the production be split into two phases: first the procedures and instructions and second the statistical information (including the I-213s). We did not come to an agreement about whether or how to split the production, although I reiterated our interest in receiving as many responsive records as possible as soon as possible. We believe that non-I-213 statistics should be producible well before the I-213s. Thus, we are concerned about delaying the release of these data by tying their release to the I-213s.

You also indicated that you have not yet been able to locate answers to the questions we posed about our request during our September 15th telephone call, including: (1) how we might narrow our I-213 request given the technological limitations in manipulating the ENFORCE document database, (2) whether ICE would be capable of manipulating the ENFORCE database to respond to the I-213 request more efficiently, and (3) how your agency keeps arrest statistics and the scope of the data available beyond what has already been produced.

You indicated that you would contact me when you begin reviewing our request. I have not yet received such notice. We appreciate your attention to this matter and eagerly await the outcome of your comprehensive review as well as your findings regarding the questions above.

Sincerely,



Jeanette Markle
Alba Villa

Exhibit O

WASHINGTON SQUARE LEGAL SERVICES, INC.
245 SULLIVAN STREET, 5TH FLOOR
NEW YORK, NEW YORK 10012
TEL: 212-998-6430
FAX: 212-995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

JEANETTE MARKLE
ALBA VILLA
Legal Interns

APRIL 2, 2010

VIA UPS NEXT DAY AIR
Tracking No. 1Z A5T 635 01 9648 1400

U.S. Customs and Border Protection
FOIA Division
799 9th Street, NW, Mint Annex
Washington, DC 20229-1177

**RE: Request for Border Patrol Performance Standards, Training
Guidelines, Arrest Forms, and Statistics Related to the Inspection of
Persons Traveling on Inter-City Trains and Buses in the Buffalo Sector**

To whom it may concern:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we request a copy of the following records:

- (1) Copies of all I-213 forms issued for persons arrested on inter-city trains and buses (such as, but not limited to, Amtrak, Greyhound, and Trailways) by Border Patrol (BP) officers operating out of the Rochester BP Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (2) The number of persons arrested by BP officers operating out of the Buffalo BP Sector and out of the Rochester BP Station for whom I-213s were issued for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, broken down by:
 - a. "Length of Time Illegally in the United States" (e.g. over 1 year, less than one year);
 - b. "Country of Citizenship"
 - c. "Cmplxn"
 - d. "Criminal Record"
- (3) The number of persons arrested while in transit on inter-city trains and buses by BP officers operating out of the Buffalo BP Sector and out of the Rochester

BP Station for whom I-213s were issued for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, broken down by:

- a. "Length of Time Illegally in the United States" (e.g. over 1 year, less than one year);
 - b. "Country of Citizenship"
 - c. "Cmplxn"
 - d. "Criminal Record"
- (4) The total number of persons arrested by BP officers operating out of the Rochester BP Station for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009.
 - (5) The total number of persons arrested by BP officers operating in the Buffalo BP Sector for 2009;
 - (6) Border Patrol officer staffing levels for the Rochester BP Station and the Buffalo BP Sector for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
 - (7) Any documents that explain the meaning of the code TCP 518.3 on the I-213 form under the box labeled "Method of Location/Apprehension;"
 - (8) Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code;
 - (9) Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 form under the box labeled "Status When Found;"
 - (10) Any documents that list other possible phrases that could be filled in on the I-213 form under the box labeled "Status When Found" along with a description of the meaning of each phrase;
 - (11) Any documents that list possible phrases that could be filled in on the I-213 form under the box labeled "Cmplxn" along with a description of the meaning of each phrase, and any documents that instruct, guide, or train officers about how to determine how to classify arrestees by their complexion;
 - (12) Any documents that list possible phrases that could be filled in on the I-213 form under the box labeled "Criminal Record" along with a description of the meaning of each phrase;
 - (13) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that BP officers operating in the Rochester BP Station and the Buffalo BP Sector were required to meet for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
 - (14) Performance review standards for BP officers operating in the Rochester BP Station and the Buffalo BP Sector for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
 - (15) All training materials addressing racial profiling;
 - (16) All training materials that pertain to the conduct of BP officers on inter-city trains and buses;
 - (17) Any reports that contain information about persons arrested on inter-city trains and buses for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;

- (18) Any agreements, understandings, or communications between U.S. Customs and Border Protection or BP and inter-city train or bus operators regarding BP checks on such trains and buses;
- (19) Any agreements, understandings, or communications between Customs and Border Protection, BP, the Department of Homeland Security, and/or Immigration and Customs and Enforcement regarding immigration checks on inter-city trains and buses; and
- (20) Any materials concerning the standards that apply to the conduct of BP officers at the border as well as in the interior of the United States.

Requestors request that any records that exist in electronic form be provided in electronic format on a compact disk. If any of the requested records or information is not kept in a succinct format, we request the opportunity to view the documents in your offices.

We agree to pay search, duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor.") A fee waiver would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (discussing that Congress intended the FOIA to be construed broadly to favor fee waivers for noncommercial requests). Families for Freedom is a nonprofit organization that is a multi-ethnic defense network by and for immigrants facing and fighting deportation, many of whom are indigent. Jane Doe, Mary Doe, and John Doe are indigent immigrants challenging their deportation in immigration proceedings.

On January 21, 2009, President Barack Obama issued a Memorandum regarding the FOIA in which he stated that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President's Memorandum underscores the importance of prompt and full disclosure of documents requested pursuant to the FOIA. Agencies must make every effort to disclose requested documents and not frivolously withhold information that could be released to the public without compromising a significant government interest. We therefore request a full and complete response to our response.

The requested information is in the public interest because it will contribute significantly to the public understanding of BP's operations, activities, and inspection in the interior of the United States that affect persons living and traveling inside the United States and it is not primarily in the commercial interest of the requester. There is currently great public interest in this subject, as evidenced by the recent publication of

numerous newspaper articles. *See, e.g., Emily Bazar, Some Travelers Criticize Border Patrol Inspection Methods, USA Today, Oct. 2, 2008, Darryl McGrath, Strangers on a Train, Metroland, July 27, 2006; John O'Brien, Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers, Syracuse City News, July 5, 2008.*

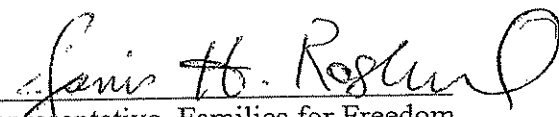
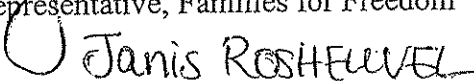
We are requesting this information to support the representation of immigrants who are currently in removal proceedings, such as Jane Doe, Mary Doe, and John Doe. We therefore respectfully request expedited processing of this request.

Please contact our representative at (212) 998-6430 with any questions. We hereby authorize disclosure of all records to our representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

Thank you for your prompt attention to this matter.

Very truly yours,


Representative, Families for Freedom


Jane Doe

Mary Doe

John Doe¹

¹ Jane Doe, Mary Doe, and John Doe have chosen to use pseudonyms because they fear retaliation for asserting their rights under the Freedom of Information Act.

numerous newspaper articles. See, e.g., Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Oct. 2, 2008, Darryl McGrath, *Strangers on a Train*, Metroland, July 27, 2006; John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Syracuse City News, July 5, 2008.

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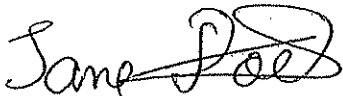
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nancy.morawetz@nyu.edu

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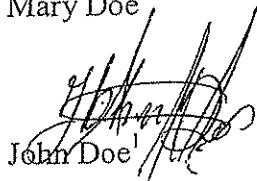
Representative, Families for Freedom



Jane Doe

Mary Doe

Mary Doe



John Doe

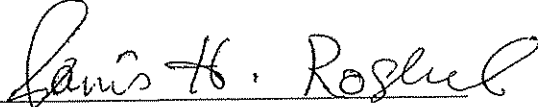
¹ Jane Doe, Mary Doe, and John Doe have chosen to use pseudonyms because they fear retaliation for asserting their rights under the Freedom of Information Act.

AUTHORIZATION AND CERTIFICATION

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Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am the Executive Director for Families for Freedom.



Janis Rosheuvel
Executive Director, Families for Freedom

Date: 4/1/10

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



Jane Doe

Date: 4/1/10

AUTHORIZATION AND CERTIFICATION

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Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.

Mary Doe
Mary Doe

Date: 11/04/2010

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



John Doe

Date: 04/01/2010

Exhibit P

WASHINGTON SQUARE LEGAL SERVICES, INC.
245 SULLIVAN STREET, 5TH FLOOR
NEW YORK, NEW YORK 10012
TEL: 212-998-6430
FAX: 212-995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

JEANETTE MARKLE
ALBA VILLA
Legal Interns

APRIL 2, 2010

VIA UPS NEXT DAY AIR
Tracking No. 1Z A5T 635 01 9673 1023

Immigration and Customs Enforcement
Freedom of Information Act/Privacy Office
800 North Capitol St., N.W.,
5th Floor, Room 585
Washington, DC 20536-5009

**RE: Request for Statistics and Other Information Related to the Inspection
of Persons Traveling on Inter-City Trains and Buses**

To whom it may concern:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we request a copy of the following records:

- (1) Copies of all I-213 forms issued for persons arrested on inter-city trains and buses (such as, but not limited to, Amtrak, Greyhound, and Trailways) by Border Patrol (BP) officers operating out of the Rochester BP Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (2) The number of persons arrested by BP officers operating out of the Buffalo BP Station and out of the Rochester BP Station for whom I-213s were issued for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, broken down by:
 - a. "Length of Time Illegally in the United States" (e.g. over 1 year, less than one year);
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- (4) Any documents that explain the meaning of the code TCP 518.3 on the I-213 form under the box labeled "Method of Location/Apprehension;"
 - (5) Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code;
 - (6) Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 form under the box labeled "Status When Found;"
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 - (10) Any agreements, understandings, or communications between Customs and Border Protection, BP, the Department of Homeland Security, and/or Immigration and Customs and Enforcement regarding immigration checks on inter-city trains and buses; and
 - (11) Any documents that contain any information regarding performance standards or arrest quotas, targets, goals and expectations for ICE officers, including those that can be satisfied by BP arrestees that are transferred to ICE custody currently in effect or in effect during the past 6 years

Requestors request that any records that exist in electronic form be provided in electronic format on a compact disk. If any of the requested records or information is not kept in a succinct format, we request the opportunity to view the documents in your offices.

We agree to pay search, duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor.") A fee waiver would fulfill Congress' intent in amending the FOIA. See *Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (discussing that Congress intended the FOIA to be construed

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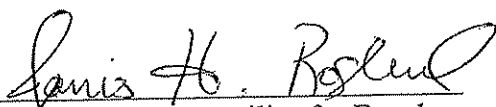
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nancy.morawetz@nyu.edu

Thank you for your prompt attention to this matter.

Very truly yours,


Representative, Families for Freedom
JANIS H. ROSHEUVEL

Jane Doe


Mary Doe

John Doe¹

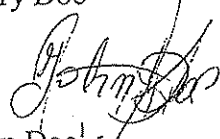
¹ Jane Doe, Mary Doe, and John Doe have chosen to use pseudonyms because they fear retaliation for asserting their rights under the Freedom of Information Act.

Very truly yours,

Representative, Families for Freedom


Jane Doe

Mary Doe.
Mary Doe


John Doe¹

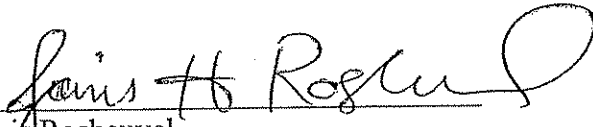
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AUTHORIZATION AND CERTIFICATION

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New York, NY 10012
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I attest under penalty of perjury that I am the Executive Director for Families for Freedom.


Janis Rosheuvel
Executive Director, Families for Freedom

Date: 4/1 /10

AUTHORIZATION AND CERTIFICATION

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Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



Jane Doe

Date: 4/1/10

AUTHORIZATION AND CERTIFICATION

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Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.

Mary Doe
Mary Doe

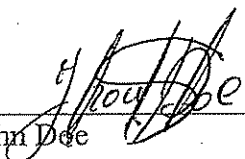
Date: 1/04/2010

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



John Doe

Date: 04/01/2010

Exhibit Q



U.S. Immigration
and Customs
Enforcement

April 6, 2010

Nancy Morawetz
Law Offices
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: 2010FOIA3660

Dear Mr. Morawetz :

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the U.S. Immigration and Customs Enforcement (ICE), dated April 2, 2010, and seeking statistics and other information related to the inspection of persons traveling on inter-city trains and buses. Your request was received in this office on April 6, 2010.

Upon initial review of your request, I have determined that the information you are seeking is under the purview of the U.S. Customs and Border Protection, a DHS component. Therefore, I am referring your request to the FOIA Officer for U.S. Customs and Border Protection, Elissa Kay, for processing and direct response to you. You may contact that office in writing at FOIA Division, 799 9th Street NW, Mint Annex, Washington, DC 20229-1177 or via telephone at (202) 325-0150.

If you need to contact this office again concerning your request, please refer to **2010FOIA3660**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,

A handwritten signature in black ink, appearing to read "Katrina M. Pavlik-Keenan".

Katrina M. Pavlik-Keenan

FOIA Director

Exhibit R

WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 5TH FLOOR

NEW YORK, NEW YORK 10012

TEL: 212-998-6430

FAX: 212-995-4031

NANCY MORAWETZ
ALINA DAS
Supervising Attorneys

JEANETTE MARKLE
ALBA VILLA
Legal Interns

APRIL 2, 2010

VIA UPS NEXT DAY AIR

Tracking No. 1Z A5T 635 01 9728 5013

Disclosure Policy & FOIA Program Development
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive SW, Building 410
STOP-0655
Washington, DC 20528-0655

**RE: Request for Communications, Performance Standards, and Reports
Related to the Inspection of Persons Traveling on Inter-City Trains and
Buses**

To whom it may concern:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we request a copy of the records indicated below. Pursuant to DHS instructions to send FOIA requests to the corresponding component agencies, we have already directed more specific requests to Customs and Border Protection and Immigration and Customs Enforcement.

- (1) Any agreements, understandings, or communications between Customs and Border Protection, U.S. Border Patrol (BP), the Department of Homeland Security, and/or Immigration and Customs and Enforcement regarding immigration checks on inter-city trains and buses (such as, but not limited to, Amtrak, Greyhound, and Trailways);
- (2) Any documents that contain any information regarding performance standards or arrest quotas, targets, goals and expectations for BP officers currently in effect or in effect during the past 6 years, preferably broken down by Sector and Station;
- (3) Any documents that contain any information regarding performance standards or arrest quotas, targets, goals and expectations for ICE officers, including

- those that can be satisfied by BP arrestees that are transferred to ICE custody currently in effect or in effect during the past 6 years; and
- (4) Any reports that contain information about persons arrested for immigration purposes on inter-city trains and buses during the past 6 years.

Requestors request that any records that exist in electronic form be provided in electronic format on a compact disk. If any of the requested records or information is not kept in a succinct format, we request the opportunity to view the documents in your offices.

We agree to pay search, duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor.") A fee waiver would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (discussing that Congress intended the FOIA to be construed broadly to favor fee waivers for noncommercial requests). Families for Freedom is a nonprofit organization that is a multi-ethnic defense network by and for immigrants facing and fighting deportation, many of whom are indigent. Jane Doe, Mary Doe, and John Doe are indigent immigrants challenging their deportation in immigration proceedings.

On January 21, 2009, President Barack Obama issued a Memorandum regarding the FOIA in which he stated that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." Memorandum, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President's Memorandum underscores the importance of prompt and full disclosure of documents requested pursuant to the FOIA. Agencies must make every effort to disclose requested documents and not frivolously withhold information that could be released to the public without compromising a significant government interest. We therefore request a full and complete response to our response.

The requested information is in the public interest because it will contribute significantly to the public understanding of BP's operations, activities, and inspection in the interior of the United States that affect persons living and traveling inside the United States and it is not primarily in the commercial interest of the requester. There is currently great public interest in this subject, as evidenced by the recent publication of numerous newspaper articles. *See, e.g.,* Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA Today, Oct. 2, 2008, Darryl McGrath, *Strangers on a Train*, Metroland, July 27, 2006; John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, Syracuse City News, July 5, 2008.


We are requesting this information to support the representation of immigrants who are currently in removal proceedings, such as Jane Doe, Mary Doe, and John Doe. We therefore respectfully request expedited processing of this request.

Please contact our representative at (212) 998-6430 with any questions. We hereby authorize disclosure of all records to our representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

Thank you for your prompt attention to this matter.

Very truly yours,


Representative, Families for Freedom
JANIS H. ROSHEL

Jane Doe

Mary Doe

John Doe¹

¹ Jane Doe, Mary Doe, and John Doe have chosen to use pseudonyms because they fear retaliation for asserting their rights under the Freedom of Information Act.

We are requesting this information to support the representation of immigrants who are currently in removal proceedings, such as Jane Doe, Mary Doe, and John Doe. We therefore respectfully request expedited processing of this request.

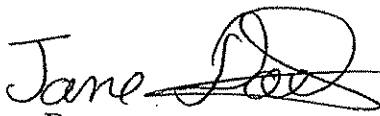
Please contact our representative at (212) 998-6430 with any questions. We hereby authorize disclosure of all records to our representative, namely:

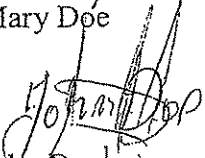
Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

Thank you for your prompt attention to this matter.

Very truly yours,

Representative, Families for Freedom


Jane Doe

Mary Doe.
Mary Doe

John Doe¹

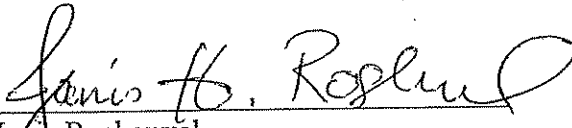
¹ Jane Doe, Mary Doe, and John Doe have chosen to use pseudonyms because they fear retaliation for asserting their rights under the Freedom of Information Act.

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all FOIA records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am the Executive Director for Families for Freedom.


Janis Rosheuvel
Executive Director, Families for Freedom

Date: 4/1/10

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



Jane Doe

Date: 4/1/10

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.

Mary Doe.
Mary Doe


Date: 1/04/2010

AUTHORIZATION AND CERTIFICATION

I hereby authorize release of all Freedom of Information Act ("FOIA") records to my representative, namely:

Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
nancy.morawetz@nyu.edu

I attest under penalty of perjury that I am an immigrant in removal proceedings challenging my deportation. I have chosen to use a pseudonym because I fear retaliation for asserting my rights under the FOIA.



John Doe

Date: _____

04/01/2010

Exhibit S



Homeland Security

Privacy Office, Mail Stop 0655

April 14, 2010

SENT VIA E-MAIL TO: NANCY.MORAWETZ@NYU.EDU

Ms. Nancy Morawetz, Esq.
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

Re: DHS/OS/PRIV 10-0566

Dear Ms. Morawetz:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated April 2, 2010 and received in this office April 8, 2010. You requested the following records:

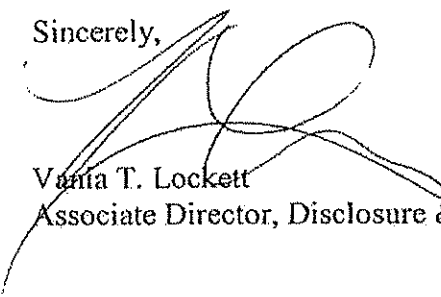
1. Any agreements, understandings, or communications between Customs and Border Protection, U.S. Border Patrol (BP), the Department of Homeland Security, and/or Immigration and Customs Enforcement regarding immigration checks on inter-city trains and buses (such as, but not limited to, Amtrak, Greyhound, and Trailways);
2. Any documents that contain any information regarding performance standards or arrest quotas, targets, goals and expectations for BP officers currently in effect or in effect during the past 6 years, preferably broken down by Sector and Station;
3. Any documents that contain any information regarding performance standards or arrest quotas, targets, goals and expectations for ICE officers, including those that can be satisfied by BP arrestees that are transferred to ICE custody currently in effect or in effect during the past 6 years; and
4. Any reports that contain information about persons arrested for immigration purposes on inter-city trains and buses during the past 6 years.

Per telephone conversation on April 14, 2010, a member of your staff confirmed that Items 2 and 3 above were already directed to U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement respectively. During that conversation, it was determined that, if any records existed within DHS Headquarters responsive to Items 1 and 4 of your request, they would be under the purview of the DHS Office of Policy (PLCY). Therefore, I am referring your request to the FOIA Officer for PLCY, Sean McAfee, Acting, for processing and direct response to you. You may contact that office by writing to U.S. Department of Homeland Security, Office of Policy, Washington, D.C. 20528, via telephone at 202-282-9583, or via e-mail at

plcy.execsec@dhs.gov. That office will also respond to you as it relates to your request for a waiver of fees in excess of \$100.00.

If there are additional DHS components that you believe to be in possession of records responsive to your request or if you have questions concerning this response, please contact this office at 866-431-0486 or 703-235-0790 and refer to **DHS/OS/PRIV 10-0566**.

Sincerely,



Vania T. Lockett

Associate Director, Disclosure & FOIA Operations

Exhibit T



**U.S. Customs and
Border Protection**

DIS1-OT-FD-CH
2010F07739

May 10, 2010

Nancy Morawetz
Washington Square Legal Services
245 Sullivan Street, 5th Fl
New York, NY 10012

Dear Ms. Morawetz:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP) received in this office on April 6, 2010, for Border Patrol performance standards, training guidelines, arrest forms, and statistics related to the inspection of persons traveling on inter-city trains and buses in the Buffalo Sector. Specifically, you requested a copy of the following records:

- (1) Copies of all I-213 forms issued for persons arrested on inter-city trains and buses (such as, but not limited to, Amtrak, Greyhound, and Trailways) by Border Patrol (BP) officers operating out of the Rochester BP Station, redacted only to exclude the names and A-numbers of the persons arrested, for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (2) The number of persons arrested by BP officers operating out of the Buffalo BP Sector and out of the Rochester BP Station for whom I-213s were issued for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, broken down by:
 - a. "Length of Time Illegally in the United States" (e.g. over 1 year, less than one year);
 - b. "Country of Citizenship"
 - c. "Cmplxn"
 - d. "Criminal Record"
- (3) The number of persons arrested while in transit on inter-city trains and buses by BP officers operating out of the Buffalo BP Sector and out of the Rochester BP Station for whom I-213s were issued for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, broken down by:
 - a. "Length of Time Illegally in the United States" (e.g. over 1 year, less than one year);
 - b. "Country of Citizenship"

- c. "Cmplxn"
- d. "Criminal Record"

- (4) The total number of persons arrested by BP officers operating out of the Rochester BP Station for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009.
- (5) The total number of persons arrested by BP officers operating in the Buffalo BP Sector for 2009;
- (6) Border Patrol officer staffing levels for the Rochester BP Station and the Buffalo BP Sector for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (7) Any documents that explain the meaning of the code TCP 518.3 on the I-213 form under the box labeled "Method of Location/Apprehension;"
- (8) Any documents that list other possible codes that could be filled in under "Method of Location/Apprehension" along with a description of the meaning of each code;
- (9) Any documents that explain the meaning of the words "In Travel" when filled in on the I-213 form under the box labeled "Status When Found;"
- (10) Any documents that list other possible phrases that could be filled in on the I-213 form under the box labeled "Status When Found" along with a description of the meaning of each phrase;
- (11) Any documents that list possible phrases that could be filled in on the I-213 form under the box labeled "Cmplxn" along with a description of the meaning of each phrase, and any documents that instruct, guide, or train officers about how to determine how to classify arrestees by their complexion;
- (12) Any documents that list possible phrases that could be filled in on the I-213 form under the box labeled "Criminal Records" along with a description of the meaning of each phrase;
- (13) Any documents that contain any information regarding arrest quotas, targets, goals and expectations that BP officers operating in the Rochester BP Station and the Buffalo BP Sector were required to meet for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (14) Performance review standards for BP officers operating in the Rochester BP Station and the Buffalo BP Sector for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (15) All training materials addressing racial profiling;

- (16) All training materials that pertain to the conduct of BP officers on inter-city trains and buses;
- (17) Any reports that contain information about persons arrested on inter-city trains and buses for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- (18) Any agreements, understandings, or communications between U.S. Customs and Border Protection or BP and inter-city train or bus operators regarding BP checks on such trains and buses;
- (19) Any agreements, understandings, or communications between Customs and Border Protection, BP, the Department of Homeland Security, and/or Immigration and Customs and Enforcement regarding immigration checks on inter-city trains and buses; and
- (20) Any materials concerning the standards that apply to the conduct of BP officers at the border as well as in the interior of the United States.

Due to the increasing number of FOIA requests received by this office, we have encountered delays in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, CBP processes FOIA requests according to their order of receipt. FOIA is currently obtaining information and as soon as any responsive documents are identified, we shall review and determine potential release of such records.

You assert that a fee waiver is warranted because the disclosure will contribute significantly to the public's understanding of government conduct. Specifically, you claim that disclosure will further public understanding of BP's operations, activities, and inspection in the interior of the United States that affect persons living and traveling inside the United States and is not in the commercial interest of the requestor. Based on a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), your letter has not established an entitlement to a fee waiver.

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 as they apply to commercial requestors; i.e., you will be charged 10-cents per page for duplication and for search and review time at the per quarter-hour rate (\$4.00, \$7.00, \$10.25) of the searcher and reviewer. You stated in your request that you are willing to pay assessable fees up to \$100.00. You will be contacted before any additional fees are accrued.

Your request has been assigned reference number **2010F07739**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 325-0150.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dorothy Pullo", with a long horizontal flourish extending to the right.

Dorothy Pullo
Director, FOIA Division
Office of International Trade

Exhibit U

WASHINGTON SQUARE LEGAL SERVICES, INC.

245 SULLIVAN STREET, 5TH FLOOR

NEW YORK, NEW YORK 10012

TEL: 212-998-6624

FAX: 212-995-4031

NANCY MORAWETZ

ALINA DAS

Supervising Attorneys

May 18, 2010

VIA UPS 2ND DAY AIR

Tracking No. 1ZA5T6350294873033

Dorothy Pullo

Director, FOIA Division

Office of International Trade

U.S. Customs and Border Protection

1300 Pennsylvania Avenue

Washington, D.C. 20229

Re: 2010 F07739

This letter is filed to appeal the denial of a fee waiver for the above referenced request.

The information sought in this request meets all of the standards set by the Justice Department for waivers in the public interest. This FOIA concerns "operations and activities of the government" and seeks to improve public understanding of those activities in a way that "is likely to contribute" to an understanding of these issues. These requests seek to obtain information about the demographics of persons who have been arrested in the Border Patrol's bus and train operations. In particular, this information will show whether those arrested are recent entrants, or meet any other identifiable agency enforcement priority. They will also show whether agents are under pressure to produce significant numbers of arrests, as has been documented with other programs of the Department of Homeland Security.

There can be no question that these operations are of great public interest and that hard data would add to public understanding. Between 2005 and 2008, Buffalo Sector experienced a conspicuously rapid growth in apprehensions. During that period, Buffalo saw an eight-fold increase in apprehensions (from 400 to 3,339), compared to a mere eleven percent increase for the northern border as a whole (from about 7,200 to just below 8,000). The 2006 to 2008 Buffalo Sector statistics were only made known to Plaintiffs through CBP's prior limited FOIA response. This FOIA request has already yielded data of significant public importance and Plaintiffs expect that disclosure of additional records and data will reveal even more valuable information. Requestors believe that arrests through transportation checks significantly bolstered the Buffalo Sector's apprehension statistics and account for a large portion of the dramatic increase between 2005 and 2008.

The information sought in these FOIA requests will help the requestors discern whether Border Patrol is engaged in unwise, unlawful and unconstitutional behavior. For instance, the I-213 arrest forms contain fields for "Length of Time Illegally in U.S.," complexion, country of citizenship, and criminal history. This information will be helpful in determining whether Border Patrol's transportation raids are identifying long-time residents or recent border-crossers, whether

they are identifying priority targets, and whether race is playing a role in questioning. Plaintiffs have also requested information concerning quotas or arrest goals, which will illuminate whether pressure exists for Border Patrol agents to bend the rules in order to produce arrests in the same way as ICE agents in the home raid context. In essence, the FOIA requests at issue here will likely elucidate data and records that will prove valuable for determining whether transportation raids implicate serious constitutional, statutory, and policy concerns.

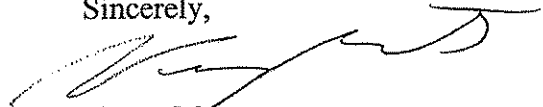
Requestors anticipate that this information can be distributed to the public much as similar information was distributed after FOIA requests on home raids, where FOIA information produced valuable data (such as the I-213 arrest forms also sought in the instant requests), which became the basis for a groundbreaking report on the issue and sparked significant media interest, including an article in the New York Times. See Cardozo Immigrant Justice Clinic, Constitution on ICE: "A Report on Immigration Home Raid Operations" (2009) 23-24, available at: http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-RaidReport%20Updated.pdf; Nina Bernstein, "Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids," N.Y. Times, July 21, 2009, available at: <http://www.nytimes.com/2009/07/22/nyregion/22raids.html?r=1&partner=rss&emc=rss>.

Although there has been much public interest in these transportation activities, there is a dearth of hard data and access to internal memoranda that would explain the standards under which border patrol officers operate. The public interest shows just how important it is for this information to be public. For examples of press accounts, see Tim Martinez, Newhouse School of Public Communications, Syracuse University, "Caught in Transit: The Rochester Border Patrol Station, Newhouse School of Public Communications," Syracuse University, <http://cmr.syr.edu/newhouse/video/article.html> (last visited March 8, 2010) (featuring a video documenting Rochester Border Patrol's transportation raids); see also Emily Bazar, "Border Patrol Expands Transportation Checks," USA Today, Oct. 1, 2008, available at: http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks_N.htm; Emily Bazar, "Some Travelers Criticize Border Patrol Inspection Methods," USA Today, Oct. 2, 2008, available at: http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm; Nadja Drost, "Border Net Catches Few Terror Suspects," Times Union, Apr. 19, 2009, available at: <http://www.timesunion.com/AspStories/story.asp?storyID=791561>; Darryl McGrath, "Strangers on a Train," Metroland, July 27, 2006, available at: <http://www.metroland.net/backissues/vol29no30/features.html>; John O'Brien, "Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers," Syracuse City News, July 5, 2008, available at: <http://www.syracuse.com/city/index.ssf/2008/06/29-week/>.

Requestors have no commercial interest in this information. The requestors are an organization that has sought to bring public attention to transportation arrests and individuals who are defending against removal proceedings and who need this data to show the illegality of their arrests.

For the above reasons, I request that the agency waive any fees in connection with this request.

Sincerely,



Nancy Morawetz