

September 27, 2023

VIA SECURERELEASE PORTAL and VIA FEDEX

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Re: **FREEDOM OF INFORMATION ACT REQUEST**
Expedited Processing and Fee Waiver Requested

Customs and Border Protection's use of CPB One for processing asylum seekers

To Whom It May Concern:

This is a Freedom of Information Act Request under 5 U.S.C Section 552 *et seq.* and 6 CFR 5.1 *et seq.* relating to the use of CBP One for asylum processing.

CBP One is a mobile app that DHS uses for processing asylum requests and scheduling immigration hearings. While DHS has used this tool since October 2020, CBP One became mandatory for immigrants to apply for asylum with the end of Title 42 on May 11, 2023. Under DHS guidelines, asylum seekers must complete this process before they come to a port of entry.

Further, as this request relates to a matter of significant current and ongoing public interest and debate, Landmark Legal Foundation ("Landmark") requests that **this records request be given expedited processing**. In addition, as Landmark is a tax-exempt organization with a long record of widely sharing public records through various media outlets as part of its public education program, Landmark **requests the waiver of all fees and costs** associated with this request.

I. Records Request

Landmark seeks disclosure of the following records from **May 11, 2023 to September 11, 2023** relating to:

1. Current data on the use of CBP One by any person seeking asylum or to immigrate to the United States.
2. Current data on illegal immigrants captured within the United States since May 11, 2023, and if they used or attempted to use CBP One to schedule an asylum hearing prior to their illegal entry after the use of CBP One became mandatory.
3. Current data on the expulsion of illegal immigrants who did not use, or incorrectly used, CBP One after it became mandatory on May 11, 2023.
4. Data on phones provided to persons seeking asylum or to immigrate to the United States to facilitate their use of CBP One.

II. Fee Waiver & Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Department regulations allow for waiver or reduction of fees. 6 CFR 5.11. Requesters must show:

- (i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and
- (ii) Disclosure of the information is not primarily in the commercial interest of the requester. 6 CFR 5.11(k).

As shown below, Landmark satisfies each of these factors.

1. The release of Requested Records will contribute significantly to public understanding of government operations or activities.

Immigration policy is both legally and politically contentious. Since CBP One became mandatory for asylum seekers on May 11, the ACLU, the Center for Gender & Refugee Studies, and the National Immigrant Justice Center filed a lawsuit arguing the compulsory use of the app violates the rights of asylum seekers.¹ The American Immigration Council has also filed a similar lawsuit.² The Texas Attorney General has also sued, arguing CBP One breaks federal immigration law and encourages illegal immigration.³ The nature of CBP One is clearly a current topic of legal debate, and the requested records will help illuminate this process as litigation proceeds.

Immigration policy is a topic of continuous political debate. Citizens deserve to know the efficiency of CBP One and if immigration law is being properly enforced. The requested data will help to explain this.

Along with Department regulations, the FOIA requires the Department to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v BAFT, 964 F. Supp.494, (D.D.C 1997). Further, “the amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’” McClellan Ecological Seepage Situation v Carucci 835 F2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept.

¹ <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-biden-administration-over-new-asylum-ban>

² <https://www.americanimmigrationcouncil.org/litigation/challenging-cbp-one-turnback-policy>

³ https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf?utm_name=

30, 1986) (statement of Sen. Leahy). Senator Leahy then explained that the 1986 amendment's purpose was "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA." 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the Department's regulations set forth factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concern "the operation or activities of the government."

This factor concerns the subject of the request. 6 CFR 5.11(k)(1)(i). Landmark seeks government records relating to the Department of Homeland Security's new procedure for immigration and asylum processing. The asylum data requested concerns the operations of DHS activities and by extension, the government.

b. Whether the disclosure is likely to contribute to an "understanding of the operations or activities of government."

This factor concerns the informative value of the information to be disclosed. 6 CFR 5.11(k)(2)(ii). The disclosure of the records sought will contribute to the public's knowledge of the details of current immigration policy and the effects it has on asylum seekers. DHS has not made public the specific data Landmark requests, and, to Landmark's knowledge, DHS has not stated whether this information will be released. Even in an instance where Congress has demanded the release of information, federal agencies have been slow to respond. The release of this data will help clarify government activities that aren't conducted in public view. This would no doubt contribute to an understanding of government operations.

c. Whether the disclosure of the requested information will contribute to "public understanding."

This factor concerns the contribution to an understanding of the subject by the public likely to result from disclosure. 6 CFR 5.11(k)(2)(iii). The disclosure of the requested information will contribute to the public understanding of the Department's operation as a result of Landmark's land record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and share the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the "public understanding" of the Department's conduct and operations:

1. Landmark will post responsive information on its website (www.landmarklegal.org), which is accessed regularly by thousands of individuals and offers the information to potentially millions of citizens;
2. Landmark will use its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
3. Landmark will include this information in its newsletter, which is distributed to thousands of individuals, groups, and the media;

4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators, and public policy organizations;
5. Landmark staff will use the information to publish articles in print and online media, many of which are widely circulated. Landmark has successfully published numerous articles in the past;
6. Landmark will issue press releases to specific media outlets; and
7. Landmark staff will appear on television and radio programs.⁴

Landmark has a proven record of ensuring that information it receives under FOIA requests garners widespread attention in print, electronic, and broadcast media. Landmark's investigations have been cited by the *Associated Press*, *The Wall Street Journal*, *The Washington Post*, *The Washington Times*, and the Fox News Channel.

Landmark's attorneys are regular guests on radio shows throughout the country. Editorials written by Landmark personnel are featured in publications such as *The Hill*, *The Federalist*, *The Daily Wire*, *MSN*, *RealClearPolicy*, and the *Dallas Morning News*.

d. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

This factor concerns the significance of the contribution to public understanding. 6 CFR 5.11(k)(2)(iv). The disclosure of the records requested will contribute significantly to the public understanding of government operations or activities. Immigration and asylum data pertaining to CBP One will clarify immigration policy and the effects CBP One has had on immigration.

Landmark satisfies each of these factors.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

To grant a fee waiver, the disclosure of the requested material must not be in the commercial interest of the requester. 6 CFR 5.11(k)(1)(ii). Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information tracts Landmark's mission to educate the public about the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest nonprofit organization. So, a waiver of fees should be granted.

B. Landmark's Request Should Receive Expedited Processing

Under Department regulations, requests may be taken out of order and given expedited treatment. 6 CFR 5.5(e). To receive expedited process, a FOIA request must show any one of four factors:

- i. Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

⁴ See *Judicial Watch, Inc. v. Rossotti*, 326 F3d. 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity that provided “nine ways in which it communicates the collected information to the public” sufficiently justified how disclosure would contribute to the public's understanding of the activities of the federal government.

- ii. *An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information;*
- iii. The loss of substantial due process rights; or
- iv. *A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity.* (Emphasis added) 6 CFR 5.5(e).

Department of Homeland Security regulations thus track the FOIA's requirement for expedited processing when a compelling need has been established. The regulations include another factor relating to government integrity. Landmark meets both factors for expedited processing.

1. Urgency to inform.

a. There is a Compelling Need for Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. There are legitimate questions on the effectiveness and legality of CBP One. As for entities "primarily engaged in disseminating information," a compelling need is shown by an "urgency to inform the public concerning actual or alleged Federal Government activity" under FOIA. 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of public interest and debate as evidenced by the numerous news articles, media reports, editorials, and coverage raised following the DHS's requirement for all asylum seekers to use CBP One. Whether this is an effective policy, consistent with immigration law, is a serious and valid question that needs addressing. Disclosure of current immigration data will help answer this question.

As immigration policy is a deeply debated question, both politically and legally, this information is vital for a well-informed populous and Congress. If this policy is not having DHS's desired effect, that information must be provided to the public. The information requested will illuminate whether this is an effective policy.

In short, Landmark meets the factor for a compelling need.

b. Landmark is Primarily Engaged in Disseminating Information

As part of its mission as a tax-exempt, public-interest law firm, Landmark investigates, litigates, and *publicizes* instances of improper and illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Landmark will post information on its website; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast, and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times*, *Wall Street Journal*, and many other national publications. Landmark's work is often discussed

on national radio talk shows. Landmark's only purpose in seeking the information is also to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the public and does not accept any government funds. As a result, Landmark must disseminate information about its activities to the public to function.

In Elec. Privacy Info. Ctr. V DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for the purposes of the FOIA. The Court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. V. DOD, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)(citing National Sec. Archive v U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Landmark gathers information of potential interest to the public, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website, and the public when Landmark officials discuss the information in print, television, and radio.

Please note, Landmark has been involved in extensive litigation arising from a governmental Department's failure to properly produce documents in accordance with its obligations under FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. The Agency was thus found in civil contempt of court. Landmark fully expects the Department to fully comply with the legal mandates set forth in the FOIA.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could show improper or politicized DHS conduct. Expediting Landmark's Request will allow Landmark -- and the public -- to understand an issue of national interest.

2. Government Integrity.

For reasons like those describing the urgency to inform the public about this matter, Landmark's request relates to an area that has questioned the integrity of DHS. If immigration law is not being followed, or there are irregularities with CBP One, the integrity of the entire immigration system is questionable. In short, Landmark's request fulfills the requirements of 6 CFR 5.5(e)(1)(iv).

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citations to applicable exemptions and supporting case law.

Please also note, while Landmark realizes that the Department considers requests for fee waivers case-by-case, Landmark has successfully litigated whether it qualifies for a fee waiver in federal court.

Furthermore, please provide assurances that DHS officials are seeking to prevent the destruction of repositories of information that may hold records responsive to this request. Additionally, know that any actions taken in contravention of the Department's responsibilities will be raised if this request becomes the subject of litigation.

For the reasons stated above, Landmark asks that the Department grant Landmark's requests for a fee waiver and for expedited processing. You may contact Benjamin Whearty at (703) 638-5999 or via email at ben@landmarklegal.org if you have questions.

Please deliver responsive records to Mr. Whearty's attention at the following address:

Benjamin L. Whearty
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Electronic copies of responsive records can be delivered via email to Mr. Whearty's email address as well.

Please produce records on a rolling basis as they become available for disclosure.

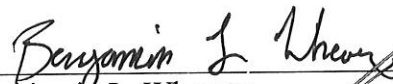
Certification

Under Department regulations and as required by law, I certify, to the best of my knowledge and belief, that the above facts are true and correct.

9/27/2023

9/22/2023

Date



Benjamin L. Whearty

Research Associate

Landmark Legal Foundation