

EXHIBIT A



July 29, 2021

Sent Via FOIAOnline:

**U.S. Customs and Border Protection
Freedom of Information Act Office**

Re: Freedom of Information Act Request Regarding U.S. Customs and Border Protection Implementation of CBP ONE™ Mobile Application

The American Immigration Council (“Council”) submits this request for information under the Freedom of Information Act (“FOIA”) regarding Customs and Border Protection’s (“CBP”) implementation of the CBP One™ Mobile Application (“CPB One”). On October 28, 2020, CBP launched CBP One as a multi-purpose tool for travelers entering and exiting the U.S.¹ One of the current features of CBP One, is a tool to process individuals enrolled in the Migrant Protection Protocols (“MPP”).² In order to access some of the application’s features, CBP One asks users to voluntarily utilize facial-recognition technology as well as submit geolocation data to complete CBP One’s functions.³ CBP requested emergency approval for the collection of information of individuals the agency processes at ports of entry, and CBP implemented the use of CBP One to accomplish this task.⁴

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), we request that the agency respond to this request within twenty (20) working days, unless otherwise permitted by statute. We also request a fee waiver in connection with this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹ U.S. Customs and Border Protection, Dept. of Homeland Security, CBP One™ Mobile Application (Feb. 22, 2021) available at <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

² *Id.*

³ U.S. Dept. of Homeland Security, Privacy Impact Assessment for the CBP One™ Mobile Application 7 (Feb. 19, 2021) available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp068-cbpmobileapplication-may2021.pdf>.

⁴ Memorandum from William Ferrara, Executive Assistant Commissioner Office of Field Operations U.S. Customs and Border Protection to Sharon Black, Acting Administrator, Office of Information and Regulatory Affairs Office of Management and Budget 2 (May 2, 2021).

I. REQUEST FOR INFORMATION

The Council seeks the following records⁵ from CBP:

Documents relating to certain technologies used by CBP One

- a. Records, including but not limited to reports, received by CBP from the Department of Homeland Security's ("DHS") Science and Technology Directorate, any other component of DHS, or the National Institute of Standards and Technology, relating to the efficacy of facial-recognition technology.
- b. Records analyzing results of the 2018 facial recognition technology pilot known as the Vehicle Face System employed at the Anzalduas, Texas port of entry.
- c. Records analyzing results of CBP's Sprint 8 pilot program deploying facial recognition technology in 2017.
- d. Records discussing the September 2020 Government Accountability Office's Report to Congressional Requesters on facial recognition technology.
- e. Records documenting and/or addressing racial disparities generated by the use of facial-recognition technology.

2. Pre-implementation documents

- a. Records prepared, received, transmitted, collected and/or maintained by Customs and Border Protection relating to the development of CBP One.
- b. Records, including but not limited to reports received by CBP from Dept. of Homeland Security's Science and Technology Directorate ("Science and Technology") relating to the development of CBP One.
- c. Records relating to purported uses for CBP One, including any plans to add features to the mobile application or to expand the uses of CBP One.
- d. Records relating to the use of CBP One to improve the processing of travelers, including but not limited to MPP enrollees or processing of I-94s.
- e. Records discussing the use of alternatives to the implementation of CBP One.
- f. Records relating to CBP's use of CBP One's geolocation tracking feature, including but not limited to the mobile application's function of sending a user's GPS coordinates to CBP when a user submits entry or exit information.

⁵ The term "records" as used herein includes all records or communication maintained in electronic or written form, including but not limited to correspondence, directives, data, videotapes, audiotapes, emails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, training manuals, technical specifications, training materials or studies, preserved by CBP on agency computers and/or other electronic storage devices.

3. Implementation of CBP One

- a. Training materials including records with instructions relating to the use of CBP One, provided to CBP staff regarding the use of the mobile application.
- b. Training materials including records with instructions relating to the use of CBP One, provided to international organizations, as the term is used in CBP's website, that will use CBP One to process individuals enrolled in MPP.
- c. Any training materials provided to broker/carriers/forwarder agents or operators with instructions as to the use of CBP One.
- d. Records relating to user requirements necessary to use CBP One.
- e. Records relating to the voluntary use of CBP One features by travelers and broker/carriers/forwarder agent or operators, including but not limited to plans by the agency to make the use of facial-recognition technology mandatory at a later date.
- f. Records relating to the development of the Privacy Impact Assessments ("PIA") for both for CBP One (DHS Reference No. DHS/CBP/PIA-068) and for Processing Individuals Subject to MPP (DHS Reference No. DHS/CBP/PIA-070).
- g. Records relating to the need to implement CBP One as an emergency measure, including but not limited to, records discussing CBP One as a tool to achieve the goals described in the CBP memorandum signed on May 2, 2021, by William Herrera, Executive Assistant Commissioner Office of Field Operations.
- h. Records created or received by CBP addressing CBP One's effectiveness thus far.
- i. Records discussing CBP's policies, protocols or plans on the sharing of information captured by any of CBP One's features with other law enforcement agencies.
- j. Records relating to the storage or maintenance of a user's GPS location data during times when the user has not submitted or logged his or her location with CBP through CBP One.

II. **REQUEST FOR FEE WAIVER**

The Council asks that the agency waive all fees associated with this FOIA request. Such a waiver is warranted because disclosure of the information 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." 5 U.S.C. § 552(a)(4)(A)(iii).

The Council is a non-profit organization without a commercial interest in the release of this information. The Council has the demonstrated ability to synthesize the information received via this FOIA request for release to and access by the public without charge.

1. Disclosure of the Information Is in the Public Interest

This FOIA request seeks information that will contribute significantly to public understanding of government operations and activities regarding CBP's use of this mobile application. While CBP has published some information relating to CBP One, it does not thoroughly explain the purpose and uses of this new mobile application. CBP published a PIA for CBP One on February 19, 2021, discussing the application's uses and potential privacy risks.⁶ CBP also published screenshots of the applications uses⁷ and explained the agency's justification for fast-tracking the use of the application in documents submitted through the Office of Management and Budget ("OMB").⁸ The documents do not address, however, CBP plans to expand the use of the technology featured in CBP One. Further, the documents fail to address the efficacy of facial recognition technology, despite studies showing that algorithms in facial recognition technology misidentified darker-skinned females at rates up to 35% higher than lighter-skinned males.⁹ The Government Accountability Office's September 2020 report admitted that CBP's pilot programs to implement facial recognition technology did not meet the performance goal of capturing 97 percent of travelers.¹⁰ Neither the PIA or other published record addresses whether CBP will make sure travelers who use the facial recognition technology in CBP One will not be misidentified.

Furthermore, CBP's published information is difficult to access. Much of the information available relating to CBP One is often labeled as pertaining to MPP, which is then not to linked to publications relating to CBP One. For example, the CBP One webpage on cbp.gov only links to the CBP One PIA, even though the PIA titled Processing Individuals Subject to MPP (DHS Reference No. DHS/CBP/PIA-070) contains substantial information about how CBP One will be used. Some explanatory documents are located in the OMB Report website, which is difficult to find and also not linked to the CBP One webpage. The scattered availability of the information about CBP One underscores the public's need for a fuller picture of the program.

The Council seeks disclosure of the requested information to advance the general public's understanding of how this new technology will be utilized by CBP and other governmental entities like the Transportation Security Administration, as well as highlighting

⁶ See *Supra* n. 1.

⁷ U.S. Customs and Border Protection, Dept. of Homeland Security, CBP One™ Submit Advance Information (April 29, 2021) *available at* <https://omb.report/icr/202104-1651-001/doc/111264101>.

⁸ U.S. Customs and Border Protection, Dept. of Homeland Security, Supporting Statement Collection of Advance Information from Certain Undocumented Individuals on the Land Border (May 4, 2021) *available at* <https://omb.report/icr/202104-1651-001/doc/111314801>.

⁹ Alex Najibi, *Racial Discrimination in Face Recognition Technology*, BLOG, SCIENCE POLICY, SPECIAL EDITION: SCIENCE POLICY AND SOCIAL JUSTICE (Oct. 24, 2020) *available at* <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>.

¹⁰ United States Government Accountability Office, *Facial Recognition CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues*, Sept. 2020 *available at* <https://www.gao.gov/assets/gao-20-568.pdf>.

the efficiency of the proposed technology. The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens and citizens, and educate the public about the enduring contributions of immigrants. The Council is a leading resource for analyzing and disseminating information about government practices to ensure accountability, and we regularly provide information to the public based on its FOIA requests.

In accordance with the Council's mission, the information requested from this FOIA will be readily available on the Council's website and will be shared with all interested members of the public. The Council will also post analysis of the information obtained through this FOIA request in a way that is easily accessible to the public. In calendar year 2020, the Council's website received more than 2.4 million pageviews from more than 1.4 million visitors. The Council also has regular contact with national print and news media and plans to share information gleaned from FOIA disclosures with interested media.

2. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requester

The Council is a not-for-profit organization and has no commercial interest in the present request. We seek the requested information for the purpose of disseminating it to members of the public and not for the purpose of commercial gain. Like all other reports and information available on the Council's website, information received in response to this FOIA request will be available to immigration attorneys, noncitizens, policymakers, and other interested members of the public free of charge. Given that FOIA's fee-waiver requirements are to be liberally construed in favor of waivers for noncommercial requesters, a waiver of all fees is justified and warranted in this case.

III. EXEMPTIONS

If CBP withholds records based on its assessment that statutory exemptions apply to any of the records requested, please describe in detail the nature of the records withheld and the specific exemption or privilege upon which the record is withheld. If any portion(s) of the requested records are determined to be exempt, please provide the non-exempt portions. 5 U.S.C. §552(a)(8)(A)(ii)(II).

IV. FORMAT OF PRODUCTION

Electronic versions in the native format of the requested documents are preferred. For documents which are not available in this format, please provide records electronically in a text-searchable, static-image format (PDF). Please also provide any data in a workable format, such as Microsoft Excel. If terms or codes are not in the form template and/or publicly

defined, please provide a glossary or other descriptive records containing definitions of acronyms, numerical codes, or terms contained in data responsive to this request.

We appreciate your prompt attention to this request. If you have any questions regarding this request, you may contact me at (202) 507-7549 or via email at rpinto@immcouncil.org.

Very truly yours,

/s/ Raul A. Pinto
Senior Staff Attorney