

VIA FOIAonline

June 12, 2020

Sabrina Burroughs, FOIA Officer
FOIA Division
U.S. Customs and Border Protection
90 K Street, NW
9th Floor, Mail Stop 1181
Washington, DC 20229

Dear Ms. Burroughs:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to U.S. Customs and Border Protection (“CBP”).

EPIC seeks records related to the agency’s use of manned aircrafts and drones¹ to surveil protestors following the police killing of George Floyd.²

Documents Requested

EPIC requests a search for all responsive records related to the following categories of documents from May 24, 2020, to present day.

1. All communications related to the recent protests sparked by the killing of George Floyd, including records mentioning the following terms:
 - a. (George) Floyd
 - b. Protest(s)
 - c. Minneapolis
 - d. San Antonio
 - e. Drone(s)
 - f. (Small) Unmanned Aircraft Systems, sUAS, or UAS
 - g. Black Lives Matter or BLM
2. All aerial video surveillance of protests that have occurred;
3. All flight data, including but not limited to flight logs, for all CBP aircrafts;

¹ Also known as Unmanned Aircraft Systems, Unmanned Aerial Systems, or UAS.

² Ryan Pickrell, *Customs and Border Protection Flew a Predator B Drone Over Minneapolis as Protests Rocked the City*, Business Insider (May 29, 2020), <https://www.businessinsider.com/cbp-flew-a-predator-b-drone-over-minneapolis-amid-protests-2020-5>.

4. All records related to requests from federal, state, or local law enforcement or agencies for CBP assistance in surveilling protestors;
5. All requests, responses, contracts, or agreements between CBP and federal, state, or local law enforcement or agencies, including but not limited to:
 - a. Requests for Support
 - b. Requests for Information
 - c. Aviation Support Requests³
 - d. Reviews of or responses to the above requests
6. All authorizations of CBP's use of aircraft outside the 100-mile border zone, including but not limited to Certificates of Authorization or FAA authorizations;
7. Any response to the June 5, 2020 House Oversight Committee letter, including the "documents and information" requested by the Committee.⁴

Background

On May 29, 2020, during a protest in Minneapolis in the wake of George Floyd's death, an investigative reporter observed a CBP Predator B drone⁵ circling over the city.⁶ The drone's flight around Minneapolis was later verified,⁷ first through ADS-B Exchange⁸ and then through a CBP statement confirming that an "unmanned aircraft system [had prepared] to . . . aid in situational awareness at the request of [their] federal law enforcement partners in Minneapolis."⁹ After the drone arrived in Minneapolis airspace, "the requesting agency determined that the aircraft was no longer needed . . . and [it] departed."¹⁰

³ See U.S. Dep't of Homeland Sec., *Use of Unmanned Aircraft Systems in Joint Operations with State, Local, and Tribal Partners* (Mar. 27, 2017), <https://www.dhs.gov/sites/default/files/publications/CBP%20-%20Use%20of%20Unmanned%20Aircraft%20Systems%20in%20Joint%20Operations.pdf>.

⁴ Letter from House Oversight Committee to Chad F. Wolf, Acting Sec'y of Homeland Sec. (June 5, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-06-05.CBM%20et.%20al%20to%20Wolf-%20DHS%20re%20Peaceful%20Protestors_0.pdf.

⁵ Also known as a "Reaper drone." See *Predator B RPA*, General Atomics Aeronautical, <https://www.ga-asi.com/predator-b>.

⁶ Pickrell, *supra* note 2.

⁷ Jason Koebler et al., *Customs and Border Protection Is Flying a Predator Drone Over Minneapolis*, Vice (May 29, 2020), https://www.vice.com/en_us/article/5dzbe3/customs-and-border-protection-predator-drone-minneapolis-george-floyd.

⁸ ADS-B Exchange, <https://www.adsbexchange.com/>.

⁹ Koebler et al., *supra* note 7.

¹⁰ *Id.*

Predator B drones are unmanned aircraft that provide real-time, high quality video feeds of the ground,¹¹ and can be outfitted with infrared cameras,¹² weapon systems,¹³ or sophisticated airborne radar systems developed to “track Taliban fighters planting roadside bombs in Afghanistan.”¹⁴ Because they are unmanned, the Predator B drones can easily monitor an area for up to 20 hours and cover up to 1,000 miles.¹⁵ General Atomics Aeronautical, the manufacturer of Predator B drones, built the drones based on “experience gained with the company’s battle-proven Predator RPA.”¹⁶ The Predator B drone has been recognized as a one of the best combat drones in the world.¹⁷

CBP has jurisdiction up to 100 miles from any U.S. border,¹⁸ which encompasses just under two-thirds of the U.S. population.¹⁹ *Vice* reviewed the recent historical flight data of three Predator B drones and found multiple instances of drones more than 100 miles from the border, including around Minneapolis and San Antonio, and of drones circling cities “for an extended period of time.”²⁰ The same CBP statement verifying the Minneapolis drone noted that the agency “routinely conducts operations with other federal, state, and local law enforcement entities to assist law enforcement . . . not just at the border.”²¹

Beyond CBP drones, other federal air craft have been detected above the George Floyd protests.²² RC-26B aircrafts, typically used by the Federal Bureau of Investigation (“FBI”) or the National Guard, were spotted over Washington D.C. and Las Vegas on June 2, 2020.²³ A small aircraft previously linked to the FBI was also spotted flying in wide circles around Washington D.C. on June 2, 2020.²⁴ Such aircrafts have been equipped with “dirtboxes” by federal authorities in the

¹¹ See David J. Bier & Matthew Feeney, *Drones on the Border: Efficacy and Privacy Implications*, Cato Institute (May 1, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/drones-border-efficacy-privacy-implications>.

¹² See Valerie Chinn, *WDRB News Gets Inside Look at \$11 Million, High-Tech Drones Used to Patrol US-Mexico Border*, WDRB (Feb. 12, 2020), https://www.wdrb.com/in-depth/wdrb-news-gets-inside-look-at-million-high-tech-drones/article_eb579620-49e4-11ea-9208-bfee03d98a62.html.

¹³ See *The World’s Top Combat Drones*, Army Technology (June 27, 2019), <https://www.army-technology.com/uncategorised/top-combat-drones/>.

¹⁴ See Brian Bennett, *Radar Shows U.S. Border Security Gaps*, L.A. Times (Apr. 3, 2020), <https://www.latimes.com/nation/la-xpm-2013-apr-03-la-na-border-radar-20130404-story.html>.

¹⁵ See Chinn, *supra* note 12.

¹⁶ *Predator B RPA*, *supra* note 5.

¹⁷ *The World’s Top Combat Drones*, *supra* note 13.

¹⁸ ACLU, *ACLU Factsheet on Customs and Border Protection’s 100-Mile Zone*, <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone>.

¹⁹ Tom McKay & Dhruv Mehrotra, *Customs and Border Protection Flew a Predator Surveillance Drone Over Minneapolis Protests Today*, Gizmodo (May 29, 2020), <https://gizmodo.com/customs-and-border-protection-flew-a-predator-surveilla-1843758034>.

²⁰ See Joseph Cox, *The Government is Regularly Flying Predator Drones Over American Cities*, *Vice* (June 3, 2020) https://www.vice.com/en_us/article/n7wnzm/government-flying-predator-drones-american-cities.

²¹ Koebler et al., *supra* note 7.

²² Pete Muntean & Gregory Wallace, *US government spy planes monitored George Floyd Protests*, CNN (June 11, 2020), <https://www.cnn.com/2020/06/11/politics/spy-planes-george-floyd-protests/index.html>.

²³ *Id.*

²⁴ Joseph Cox, *The Military and FBI Are Flying Surveillance Planes Over Protests*, *Vice* (June 3, 2020), https://www.vice.com/en_us/article/y3zvwj/military-fbi-flying-surveillance-planes-george-floyd-protesters.

past.²⁵ Finally, during protests in Milwaukee from May 31 to June 7, 2020, a FBI surveillance plane flew over the city several times.²⁶

This is not the first time the federal government has been involved in aerial monitoring of protests. In 2015, during protests of Freddie Gray's death, the FBI used manned aircraft to surveil protestors in Baltimore.²⁷ The FBI eventually released the video surveillance footage in response to an American Civil Liberties Union FOIA request.²⁸

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the U.S. Department of Homeland Security's ("DHS") FOIA regulations.²⁹ Specifically, this request is entitled to expedited processing because there is an "urgency to inform the public about an actual or alleged federal government activity," and because the request is "made by a person who is primarily engaged in disseminating information."³⁰

First, there is "urgency to inform the public concerning actual or alleged federal government activity."³¹ CBP's use of a Predator drone at the request of Minneapolis law enforcement constitutes an "actual . . . federal government activity."³²

There is "clear urgency" to release the requested information because the federal government's deployment of a Predator B drone to aid Minneapolis law enforcement concerns the ongoing, global protests³³ related to George Floyd's death, which is the subject of intense scrutiny from the media, lawmakers, and the public. Media coverage, including social media, of the protests has completely dwarfed other news stories, even coverage of COVID-19.³⁴ At least 430 cities and towns have held demonstrations across all 50 states,³⁵ which President Trump has responded to by

²⁵ Devlin Barrett, *Americans' Cellphones Targeted in Secret U.S. Spy Program*, Wall St. J. (Nov. 13, 2014), <https://www.wsj.com/articles/americans-cellphones-targeted-in-secret-u-s-spy-program-1415917533>.

²⁶ Bruce Vielmetti, *Feds charge Milwaukee man with pointing laser at FBI, National Guard aircraft flying over protests*, Milwaukee J. Sentinel (June 8, 2020), <https://www.jsonline.com/story/news/crime/2020/06/08/milwaukee-man-charged-pointing-laser-helicopter-over-protests/5322196002/>.

²⁷ See Nathan Freed Wessler & Naomi Dwork, *FBI Releases Secret Spy Plane Footage From Freddie Gray Protests*, ACLU (Aug. 4, 2016), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/fbi-releases-secret-spy-plane-footage-freddie-gray>.

²⁸ See *id.*

²⁹ 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii).

³⁰ 6 C.F.R. §5.5(e)(1)(ii).

³¹ *Id.*

³² *Id.*

³³ See Peter Aitken, *Protests Sparked by George Floyd's Death Get Support from Around the World*, Fox News (May 31, 2020), <https://www.foxnews.com/world/protests-spread-across-globe-george-floyd>.

³⁴ See Sara Fischer et al., *Protest coverage dwarfs Coronavirus*, Axios (June 2, 2020), <https://www.axios.com/george-floyd-protests-coronavirus-media-coverage-08e7aa7c-1a31-4f1a-98b1-adf3229797ca.html>.

³⁵ Janie Haseman et al., *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA Today (June 4, 2020), <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/>.

stating he will take “immediate action” to mobilize “all available federal resources,”³⁶ which likely includes CBP manned and unmanned aircrafts. The House Oversight Committee has spoken out against the use of federal aircrafts for surveilling protests, and has in fact requested the disclosure of information about DHS’s assistance in surveilling protests, which includes the use of the Predator B drone at the George Floyd protests.³⁷ Moreover, the protests are ongoing, attracting thousands of protestors and increasing the likelihood that state law enforcement will seek federal assistance. Attorney General William Barr has already sent “specialized teams of federal agents to help control protests,”³⁸ and the FBI announced it would maintain “24-hour command posts in all . . . 56 field offices” in response to the protests.³⁹

Second, EPIC is an organization “primarily engaged in disseminating information.”⁴⁰ As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA.⁴¹ EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.⁴²

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.⁴³

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.⁴⁴ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.⁴⁵

Further, any duplication fees should also be waived because disclosure is (1) “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interest of” EPIC, the requester.⁴⁶ EPIC’s request satisfies this standard based on the DHS’s considerations for granting a

³⁶ Morgan Phillips, *Trump Vows to Mobilize Federal Resources in Address to Nation, Makes Surprise Trip to Church that Caught Fire*, Fox News (June 2, 2020), <https://www.foxnews.com/politics/trump-vows-to-mobilize-federal-resources-to-end-riots-i-will-fight-to-protect-you>.

³⁷ See Letter from House Oversight Committee, *supra* note 4.

³⁸ Ryan Lucas, *Attorney General Steps Up Federal Law Enforcement Response To Protests*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/867059312/attorney-general-steps-up-federal-law-enforcement-response-to-protests>.

³⁹ Press Release, Fed. Bureau of Investigation, FBI Director Christopher Wray’s Remarks at Press Conference Regarding Civil Unrest in Wake of George Floyd’s Death (June 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-director-christopher-wrays-remarks-at-press-conference-regarding-civil-unrest-in-wake-of-george-floyds-death>.

⁴⁰ 6 C.F.R. § 5.5(e)(1)(ii).

⁴¹ *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

⁴² EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

⁴³ 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(e)(3).

⁴⁴ *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003).

⁴⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1)–(2).

⁴⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1).

fee waiver.⁴⁷

(1) *Disclosure of the requested information is likely to contribute to public understanding of the operations or activities of the government.*

Disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁴⁸ The DHS evaluates four factors to determine whether the “public interest” condition is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government”; (ii) disclosure must be “meaningfully informative about government operations or activities”; (iii) disclosure “must contribute to the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) “[t]he public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.”⁴⁹ EPIC’s request satisfies all four factors.

First, the requested records clearly “concern identifiable operations or activities of the Federal Government,” namely: CBP’s recent use of a Predator drone for state law enforcement purposes.⁵⁰

Second, disclosure of the requested records is “‘likely to contribute’ to an increased public understanding of those operations or activities.”⁵¹ Disclosure would “be meaningfully informative about government operations or activities” because little information has been released about CBP’s use of military-grade Predator drones or other aircrafts in collaboration with state law enforcement regarding protests. The records requested will help inform the public on the extent of aerial surveillance of the ongoing protests related to the killing of George Floyd.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because DHS components must “presume[] that a representative of the news media,” such as EPIC, “will satisfy this consideration.”⁵² The requested records will reach a large audience through EPIC’s widely read website, <https://epic.org>, where EPIC routinely posts and interprets privacy-related government documents obtained under the FOIA. EPIC’s FOIA work is also frequently covered through major media outlets.⁵³

Fourth, “[t]he public's understanding of the subject in question [will] be enhanced by the disclosure to a significant extent.”⁵⁴ Whether CBP is using drones, and the extent of such potential use, is unknown. Further, it is unclear whether the agency considered potential privacy implications if they did agree to and have used their drones to surveil protesters.

⁴⁷ 6 C.F.R. § 5.11(k)(2)–(3).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

⁵⁴ 6 C.F.R. § 5.11(k)(2)(iv).

(2) *Disclosure of the information is not primarily in the commercial interest of the requester.*

The “[d]isclosure of the information is not primarily in the commercial interest” of EPIC.⁵⁵ The DHS components evaluate two considerations in assessing this requirement: (i) whether there are “any commercial interest of the requester . . . that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.”⁵⁶

First, there is no “commercial interest of the requester . . . that would be furthered by the requested disclosure.”⁵⁷ EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.⁵⁸ EPIC has no commercial interest in the requested records.

Second, “the public interest is greater than any identified commercial interest in disclosure.”⁵⁹ Again, EPIC is a non-profit organization with no commercial interest in the requested records and has established that there is significant public interest in the requested records. Moreover, the DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.”⁶⁰ Here, EPIC is a news media requester, and this request satisfies the public interest standard.

For these reasons, EPIC’s request for a fee waiver should be granted.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

⁵⁹ 6 C.F.R. § 5.11(k)(3)(ii).

⁶⁰ *Id.*

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days, per 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(e)(4). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or zhou@epic.org, cc: FOIA@epic.org.

Respectfully Submitted,

/s/ Serena Wong

Serena Wong
EPIC Clerk

/s/ Enid Zhou

Enid Zhou
EPIC Open Government Counsel