



Homeland  
Security

September 5, 2018

MEMORANDUM FOR: Kevin K. McAleenan  
Commissioner  
U.S. Customs and Border Protection

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SUBJECT: Personal Search of a Transgender Traveler  
Complaint No. 17-07-CBP-0263

*Purpose:* The purpose of this memorandum is to provide recommendations to update the CBP Office of Field Operations (OFO) *Personal Search Handbook* and issue a muster instructing officers on the appropriate way to search transgender individuals consistent with the 2015 *National Standards on Transport, Escort, Detention, and Search* (TEDS).

*Background:* On March 30, 2017, the CBP INFO Center received an email referral (No. 170330-002565) from a United States citizen regarding her inspection at the Detroit-Windsor Tunnel Port of Entry on the same date; the email was forwarded to CRCL on April 5, 2017. The Complainant is a transgender woman; her state identification and United States passport identify her as female, consistent with her outward gender presentation.<sup>1</sup>

The Complainant's allegations are in relevant part consistent with the detailed TECS record of her inspection, which contains the following narrative describing the secondary inspection after the discovery of marijuana residue in her vehicle:

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<sup>1</sup> As the U.S. Office of Personnel Management (OPM) explains the relevant terms, "Someone who was assigned the male sex at birth but who identifies as female is a *transgender woman*." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.

[The CBPO] explained to [the Complainant] that she would be patted down for further contraband according to the CBP search policy regarding gender of traveler and officers. Due to [the Complainant]’s masculine name and masculine appearance, [The CBPO] discreetly questioned the nature of [the Complainant]’s gender.

At this time, [the Complainant] stated to [the CBPO] that she was a female, as stated on her Michigan Driver License and U.S. Passport. [The CBPO] informed [the Complainant] that if she still had male anatomy that a male officer would have to perform the pat down search of that portion of her body. [The Complainant] became upset and stated that both her license and passport listed her as a female and that is her gender. [The Complainant] did not confirm or deny the presence of any male anatomy. . . .

[The SCBPO] was apprised of the situation and stated that female officers would begin the pat down, as [the Complainant] states that she is a female. Furthermore, if male anatomy was found, the search would cease at that time until male officers could complete the pat down of any male portions of the body.<sup>2</sup>

The search proceeded on this basis with two female officers conducting the search above her waist and two male officers conducting the search below her waist. The search was negative and the Complainant was allowed to proceed home.

*Analysis:* The relevant, undisputed facts indicate that the officers involved were following Chapter 2, Section F, of the OFO *Personal Search Handbook*, CIS HB 3300-04B:

In rare cases where personal searches will be conducted on transsexuals (including those undergoing treatment for a gender change operation, but not transvestites), the following shall apply. The CBP [sic] shall accommodate the traveler and provide different gender officers to search those areas of the body that are appropriate for the same gender.

This provision conflicts with CBP’s more recent *National Standards on Transport, Escort, Detention, and Search* (TEDS), Section 3.4:

#### GENDER OF SEARCHING OFFICER/AGENT

Whenever operationally feasible, officers/agents conducting a search or that are present at a medical examination, must be of the same gender, gender identity, or declared gender as the detainee being searched.

CRCL believes that the TEDS policy is a substantial improvement over the *Personal Search Handbook* in many respects: it requires fewer CBP personnel (two rather than four) and is more respectful of travelers’ dignity and privacy.

This issue has been the subject of discussion at the staff level between CRCL and CBP for many years. CRCL has not identified any major U.S. law enforcement or detention agency that still

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<sup>2</sup> TECS Incident Log Query – Detail, p.2.

follows the “split search” approach described in the *Personal Search Handbook*.<sup>3</sup> Rather, agencies with publicly available search policies follow a policy of allowing transgender individuals to be searched by officers of the same gender as their gender identity.<sup>4</sup> For example, searches by the New York Police Department are conducted by an officer of the gender requested by the subject where the arrestee’s gender is not immediately apparent or the arrestee objects to the gender of the officer assigned to perform the search.<sup>5</sup> In fact, even other Components within DHS have updated their policy. The Transportation Security Administration policy provides that pat-searches of transgender travelers will be performed by officers of the same gender as the traveler presents.<sup>6</sup>

The TEDS policy, issued in October 2015, appropriately mirrors the consensus approach of other DHS components and law enforcement agencies in attempting, where operationally feasible, to provide individual searches by an officer of the same gender as the subject presents, regardless of whether the subject was born in, or has transitioned to, his or her gender. In the Complainant’s case, it was operationally feasible for a female CBP officer to perform the search.

*Conclusion:* The search of the Complainant, while consistent with CBP’s *Personal Search Handbook*, was inconsistent with the more recent TEDS policy, in § 3.4. The officers’ compliance with the *Personal Search Handbook* resulted in unnecessary distress to the Complainant. CRCL found no evidence that officers were following the CBP TEDS policy instead of the OFO *Personal Search Handbook* where the two conflicted.

Based on the above, CRCL makes the following recommendations:

- (1) OFO should update the *Personal Search Handbook* and other relevant policies or guidance so that they are consistent with TEDS.
- (2) After updating the *Personal Search Handbook*, OFO should release a muster instructing CBPOs on the appropriate way to search transgender individuals consistent with TEDS.

It is CRCL’s statutory role to advise Department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decision and implementation of those decisions. The above recommendations are pursuant to that role; we believe it will assist you in meeting CBP’s important mission. Please inform CRCL within 60 days whether you concur or non-concur with the recommendations; if you concur, please indicate the specific actions you have taken to implement the recommendations, or an action plan and timeline for completion. This communication can take place by emailing Policy Advisor Thomas Sharp at <sup>(b)(6)</sup>; or if you would prefer, by contacting Compliance Branch Director Dana Salvano-Dunn at <sup>(b)(6)</sup>

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<sup>3</sup> It is common in Canada to offer three choices to transgender individuals: a split search, a search by a male officer, or a search by a female officer. For example, the Canadian Air Transport Security Authority allows travelers to select between single-sex or split searches. See CATSA, *Transgender Passengers*, at <http://www.catsa.gc.ca/transgender>.

<sup>4</sup> See, e.g., U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5200.04: Transgender Offender Manual (Jan. 18, 2017).

<sup>5</sup> NYPD Patrol Guide, Procedure No. 208-05: Arrests – General Search Guidelines (Aug. 1, 2013).

<sup>6</sup> TSA, *Transgender Passengers*, at <https://www.tsa.gov/transgender-passengers>.

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