



**Homeland
Security**

February 4, 2022

MEMORANDUM FOR: Chris Magnus
Commissioner
U.S. Customs and Border Protection

Scott K. Falk
Chief Counsel
U.S. Customs and Border Protection

FROM: Dana Salvano-Dunn (b)(6)
Director, Compliance Branch
Office for Civil Rights and Civil Liberties

(b)(6)
Attorney Advisor, Legal Counsel Division
Office of the General Counsel

SUBJECT: United States Border Patrol Critical Incident Teams
Complaint No. 002687-22-CBP¹

The Office for Civil Rights and Civil Liberties (CRCL) has opened complaints alleging potential violations of civil rights or civil liberties related to the U.S. Border Patrol (USBP) Critical Incident Teams (CIT) regarding CIT allegedly involving themselves in criminal investigations without authority. The purpose of this memorandum is to notify you of the complaints, describe those allegations, and inform you that CRCL will retain these complaints for investigation.

ALLEGATIONS

In a letter to Congress dated October 27, 2021, the Southern Border Communities Coalition (SBCC) alleged, CIT has no authority to conduct criminal or administrative investigations of agents [and employees of CBP] and are allegedly engaged in obstruction of justice; CIT allegedly exacerbate[s] the impunity of border agents while abuse continues unabated; and CIT allegedly operates in the shadows, undermining public safety and trust.

On October 28, 2021, CRCL reviewed a San Diego Union-Tribune news article, titled Border Patrol has a *Shadow Police Unit that Protects Agents When They Kill, Groups Say* regarding “special, secretive units that work to cover up any wrongdoing when an agent kills someone or otherwise use force in potential problematic ways.” The article, dated October 28, 2021, reports

¹ CRCL received additional information on this issue, which was opened as Complaint No. 003204-22-CBP.

that SBCC and Alliance San Diego sent a letter, as referenced above, to call for an investigation regarding these units and “suggests that the agents who worked for them could be charged criminally with obstruction of justice.” The article reports the letter alleged that the “shadow police units” have been “operating since at least 1987 and without any actual authority under federal law.” The article reports that the human rights attorneys “investigating the 2010 killing of Anastasio Hernandez Rojas at the San Ysidro Port of Entry found indications that the unit based in San Diego had tampered with and even destroyed evidence in the case to protect the agents involved.” Further, the article reports that the “Critical Incident Investigative Team controlled witness lists and were present at every interview during the San Diego police investigation.”²

For the purposes of this investigation, CRCL will focus on the allegations concerning the CIT’s oversight role: their responsibility, authority, independence, procedures, involvement in (criminal) and UFIT investigations, support to OPR and other law enforcement agencies, training, chain-of-command, codifying roles, and coordination. This investigation will review CBP policies, procedures and training related to CIT, and practices used by CIT while conducting investigations.

CRCL

CRCL Mission. CRCL supports the Department’s mission to secure the Nation while preserving individual liberty, fairness, and equality under the law. CRCL integrates civil rights and civil liberties into all the Department’s activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners;
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns;
- Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel;
- Leading the Department's equal employment opportunity programs and promoting workforce diversity and merit system principles.

CRCL authorities. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL is charged with investigating and assessing complaints against DHS employees and officials of abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion. The procedures for our investigations and the recommendations they may generate are outlined in DHS Management Directive 3500.

² CRCL will not be investigating the death of Anastasio Hernandez Rojas as this has been investigated and litigated. However, CRCL will review the allegations related to the CIT’s review of the incident.

Access to information. More particularly, 42 U.S.C. § 2000ee-1(d) grants this Office access to the “information, material, and resources necessary to fulfill the functions” of the office, including the complaint investigation function; Management Directive 3500 further authorizes CRCL to:

- “Notify[] the relevant DHS component(s) involved of the matter and its acceptance by CRCL, and whether the matter will be handled by CRCL or by the component organization”;
- “Interview[] persons and obtain[] other information deemed by CRCL to be relevant and require[e] cooperation by all agency employees”; and
- “Access[] documents and files that may have information deemed by CRCL to be relevant.”

Reprisals forbidden. In addition, 42 U.S.C. § 2000ee-1(e) forbids any Federal employee to subject a complainant or witness to any “action constituting a reprisal, or threat of reprisal, for making a complaint or for disclosing information to” CRCL in the course of this investigation.

This memorandum and its accompanying request for information are pursuant to these authorities.

Privilege and required transparency. Our communications with CBP personnel and documents generated during this review, particularly the final report, will be protected to the maximum extent possible by attorney-client and deliberative process privileges. Under 6 U.S.C. § 345(b), however, we submit an annual report to Congress—also posted on CRCL’s website—that is required to detail “any allegations of [civil rights/civil liberties] abuses . . . and any actions taken by the Department in response to such allegations.”

We look forward to working with your staff on this matter and will report back to you our findings and any recommendations.

SCOPE OF REVIEW

The purpose of our review is to determine whether CBP has complied with applicable policies and procedures relating to CIT; if the facts we find suggest that the Constitution, a federal statute, or a Departmental policy has been violated; and what steps, if any, should be taken by CBP to address any concerns CRCL identifies, both individually (if the problem is ongoing) and as a matter of policy. It is our goal to produce a report that will assist you in making CBP the best agency possible.

QUESTIONS PRESENTED

(b)(5)



(b)(5)

INITIATING THE INVESTIGATION

We request an initial discussion with CBP about these complaints and CRCL's plans for reviewing these matters. Senior Policy Advisor (b)(6) will be handling this review. We look forward to working together to determine all the facts surrounding this matter and if appropriate, the best way forward. If you have any questions, please do not hesitate to contact (b)(6) by phone at (b)(6) or by email at (b)(6)

Enclosure

Copy to:

Nathaniel Kaine
Acting Chief of Staff
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Raul L. Ortiz
Chief
U.S. Border Patrol
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Matthew J. Hudak
Deputy Chief
U.S. Border Patrol
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Rebekah Salazar
Executive Director
Privacy and Diversity Office
Office of the Commissioner
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Eric W. Dugger
Director
Office of Professional Responsibility
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Kristy Montes
Director, Custody Support and Compliance Division
Privacy and Diversity Office
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)