

August 10, 2018

VIA E-MAIL

Mr. Chris Casto
Senior Advisor
Bureau of Justice Assistance
U.S. Department of Justice
810 Seventh Street NW
Washington, DC 20531
DICRAComments@usdoj.gov

Re: Death in Custody Reporting Act Collection, 83 Fed. Reg. 27,023 (June 11, 2018)

Dear Mr. Casto:

On behalf of the Southern Poverty Law Center (SPLC), I am writing in response to the Department of Justice's (DOJ) request for comments on the Bureau of Justice Assistance's (BJA) guidelines for implementing the Death in Custody Reporting Act (DCRA). The SPLC is dedicated to fighting hate and bigotry and seeking justice for the most vulnerable members of our society. Using litigation, education, and other forms of advocacy, the SPLC works toward the day when the ideals of equal justice and equal opportunity will be a reality. Our lawsuits have toppled institutional racism and stamped out remnants of Jim Crow segregation; destroyed some of the nation's most violent white supremacist groups; and protected the civil rights of children, women, the disabled, immigrants and migrant workers, prisoners, the lesbian, gay, bisexual, and transgender community, and many others who face discrimination, abuse, or exploitation.

DOJ should adopt the near-final guidelines for DCRA that were published in the Federal Register on December 19, 2016.¹ These guidelines reflect extensive review and public engagement by DOJ through two comments periods initiated on August 4, 2016² and December 19, 2016.³ According to DOJ's latest notice published on June 11, 2018, states will not be required to start reporting quarterly DCRA data until October 2019 (the first quarter of FY 2020)⁴—nearly five years after DCRA was enacted.⁵ Even more concerning, the June 2018 proposed guidelines are significantly less likely to result in timely, accurate, and complete data collection from states compared to the December 2016 proposed guidelines.

¹ Death in Custody Reporting Act Collection, 81 Fed. Reg. 91,948 (proposed Dec. 19, 2016) [hereinafter December 2016 Notice].

² Arrest-Related Deaths Program, 81 Fed. Reg. 51,489 (proposed Aug. 4, 2016).

³ December 2016 Notice, *supra* note 1.

⁴ Death in Custody Reporting Act Collection, 83 Fed. Reg. 27,023, 27,024 (proposed June 11, 2018) [hereinafter June 2018 Notice].

⁵ Death in Custody Report Act, Pub. L. No. 113-242, 128 Stat. 2860 (enacted Dec. 18, 2014).

DOJ should immediately implement the December 2016 proposed guidelines to states (Part I below) so that DCRA reporting will start no later than October 2018 (the start of FY 2019); incorporate additional guidelines for reporting by states (Part II); make public all guidelines to federal law enforcement agencies and reports on data already collected from federal agencies (Part III); and clarify how it has calculated the projected burden on states (Part IV).

I. DOJ should immediately implement the December 2016 proposed guidelines, which would enable data collection to begin in October 2018, a year earlier than DOJ’s current plan.

A. DOJ should, at a minimum, adopt the list of circumstances set forth in the December 2016 proposed guidelines to define the scope of deaths that are reportable under DCRA.

DCRA requires states and federal law enforcement agencies to report information about the death of anyone who is “detained, under arrest, or is in the process of being arrested, is en route to be incarcerated, or is incarcerated.”⁶ DOJ’s December 2016 proposed guidelines included a list of five sets of circumstances (with examples) to define the scope of deaths that DOJ would require to be reported under DCRA.⁷ In contrast, DOJ’s June 2018 proposed guidelines omit this list and instead define “reportable death” as those that “that occurred during interactions with law enforcement personnel or while the decedent was in their custody or in the custody, under the supervision, or under the jurisdiction of a State or local law enforcement or correctional agency, such as a jail or prison.”⁸ The June 2018 definition merely restates what Congress already requires under DCRA and fails to provide clear and specific guidance to states on which circumstances will trigger DCRA’s reporting requirements.

The SPLC urges DOJ to adopt the five-point list of circumstances it published in its December 2016 proposed guidelines to help reporting entities understand their DCRA obligations and ensure that all deaths that occur as a result of a law enforcement officer’s use of force or under the jurisdiction of a state or local government or correctional agency are reported.

B. DOJ should, at a minimum, institute the four-step data collection procedure set forth in its December 2016 proposed guidelines.

DOJ’s December 2016 proposed guidelines set out a four-step procedure that would rely on data collected directly from agencies and cross-checked against open-source reporting.⁹ These proposed guidelines would require states to 1) submit a quarterly summary of all reportable deaths (arising from law enforcement encounters and occurring in the custody of prisons and jails) on a form known as “DCR-1”; 2) submit incident reports on all deaths reported on DCR-1 using forms “DCR-1A” (deaths reportable by law enforcement agencies) and “DCR-1B” (deaths reportable by corrections agencies); 3) submit incident reports for all reportable deaths identified

⁶ *Id.* § (2)(a), 34 U.S.C.A. § 60105(a) (West 2018).

⁷ December 2016 Notice, *supra* note 1, at 91,950.

⁸ June 2018 Notice, *supra* note 4, at 27,024.

⁹ December 2016 Notice, *supra* note 1, at 91,950-51.

through BJA’s open-source analysis (listed on form “DCR-2”) for which the state has NOT previously submitted an incident report (again using DCR-1A or DCR-1B); and 4) submit a Data Collection Plan that describes how the state intends to ensure timely, accurate, and complete reporting of all data required by DCRA and DOJ guidelines. In contrast to DOJ’s December 2016 proposed guidelines, DOJ’s June 2018 proposed guidelines¹⁰ are not nearly as detailed or thorough and do not specify that DOJ would use the hybrid methodology of collecting data directly from states and cross-checking these data against open-source reporting. Using only state-reported data could mean that states will fail to report on deaths identified through open-source methods; using only open-source methods would fail to carry out Congress’s clear intent that states assume the obligation of reporting timely, accurate, and complete data on all deaths. The Bureau of Justice Statistics has found that this hybrid methodology increases the completeness and quality of data collected from law enforcement agencies.¹¹

The SPLC urges DOJ to adopt the four-step, hybrid approach outlined in its December 2016 proposed guidelines to ensure accurate and complete data collection.

C. DOJ should, at a minimum, require states to submit Data Collection Plans as set forth in its December 2016 proposed guidelines.

DOJ’s December 2016 proposed guidelines would require states to submit Data Collection Plans to “aid DOJ in assisting States that are seeking to improve their collection plans and help DOJ evaluate the reliability of all data collected.”¹² In contrast, the June 2018 proposed guidelines do not even mention a requirement for states to submit Data Collection Plans,¹³ which serve the dual purpose of 1) ensuring that states develop effective means of communicating with local law enforcement agencies regarding DCRA’s reporting requirements; and 2) informing DOJ, Congress, and the public of whether and how states are carrying out their data collection duties.

The SPLC urges DOJ to adopt the requirement outlined in its December 2016 proposed guidelines for states to submit Data Collection Plans.

D. DOJ should, at a minimum, reduce states’ awards under the Edward Byrne Memorial Justice Assistance Grant Program for noncompliance with DCRA, as set forth in DOJ’s December 2016 proposed guidelines.

After years of inadequate reporting by states, Congress added a provision in DCRA authorizing the Attorney General to reduce by up to 10% Edward Byrne Memorial Justice Assistance Grant Program funds to any state that “fails to comply” with DCRA’s reporting requirements, including DOJ’s guidelines.¹⁴ DOJ’s December 2016 proposed guidelines indicated that DOJ

¹⁰ June 2018 Notice, *supra* note 4.

¹¹ See Duren Banks et al., *Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 250112, at 9 (Dec. 22, 2016), <https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf>.

¹² December 2016 Notice, *supra* note 1, at 91,951.

¹³ June 2018 Notice, *supra* note 4.

¹⁴ Death in Custody Report Act § (2)(c)(2), 34 U.S.C.A. § 60105(c)(2) (West 2018).

planned to exercise this penalty authority.¹⁵ In contrast, DOJ's June 2018 proposed guidelines¹⁶ do not contain any information on plans to withhold Byrne funds from non-compliant states.

The SPLC urges DOJ to adopt the plan outlined in the December 2016 proposed guidelines for withholding Byrne grants, the largest source of federal funding for state and local law enforcement.¹⁷ Doing so would provide a powerful incentive to states to provide accurate and complete data rather than selecting the "unknown" and "unavailable" categories on the incident reports or failing to submit quarterly summaries or incident reports altogether.

E. DOJ should, at a minimum, make public all of the information it pledged in its December 2016 proposed guidelines to make public.

DOJ's December 2016 proposed guidelines pledged to make public "the State plans [i.e., the Data Collection Plans], the number of deaths reported for each agency and facility, and data on the circumstances surrounding those deaths."¹⁸ In contrast, DOJ's June 2018 proposed guidelines make no mention of any data collected under DCRA that DOJ plans to make public. This could potentially mean that members of Congress would have to request DCRA data from DOJ, and members of the public would have to file Freedom of Information Act (FOIA) requests to obtain DCRA data. This would consume significant resources (including imposing a burden on DOJ's FOIA officers) compared to the burden it would place on DOJ to make the data and other materials it receives from state and federal agencies publicly available. It would also cause significant delay in the public's ability to obtain DCRA data, as it can take the Office of Justice Programs (where BJA is housed) months to process even simple FOIA requests.¹⁹

The SPLC urges DOJ to adopt the plan outlined in its December 2016 proposed guidelines to make public states' Data Collection Plans, an agency-level breakdown of reported deaths, and data on the circumstances surrounding those deaths.

II. DOJ should implement, in addition to the December 2016 proposed guidelines, the following proposals to ensure timely, accurate, and complete data collection and to facilitate maximum transparency.

A. DOJ should add to the circumstances giving rise to "reportable deaths" those deaths that occur in hospitals and medical facilities while the prisoner or detainee is still under the jurisdiction of the federal or a state or local government.

¹⁵ December 2016 Notice, *supra* note 1, at 91,951.

¹⁶ June 2018 Notice, *supra* note 4.

¹⁷ Gretta L. Goodwin, *DOJ Grants Management: Justice Has Made Progress Addressing GAO Recommendations: Testimony Before the Subcommittee on Government Operations, Committee on Oversight and Government Reform, House of Representatives*, GOV'T ACCOUNTABILITY OFF. 5 (July 14, 2016), <https://www.gao.gov/assets/680/678440.pdf>.

¹⁸ December 2016 Notice, *supra* note 1, at 91,952.

¹⁹ *United States Department of Justice Annual Freedom of Information Act Report: Fiscal Year 2017*, U.S. DEP'T OF JUST., OFF. OF INFO. POL'Y 40 (Jan. 18, 2018), <https://www.justice.gov/oip/page/file/1024596/download>.

DOJ's December 2016 proposed guidelines included in the list of circumstances that would give rise to a reportable death those deaths that occur "[w]hile the decedent was under the jurisdiction or supervision of a law enforcement agency or correctional or detention facility but located elsewhere, such as special jail facilities (e.g., medical/treatment/release centers, halfway houses, or work farms), or in transit."²⁰ This definition could be read to exclude deaths that occur at non-correctional hospitals or medical facilities, even though terminally ill prisoners and detainees are often transferred to such facilities.²¹

In addition to restoring DOJ's December 2016 proposed guidelines, DOJ should add to the list of reportable deaths those that occur in hospitals or medical facilities while the prisoner or detainee is still under the jurisdiction²² of the federal or a state or local government.

B. DOJ should require reporting on disabilities of those who die during encounters with law enforcement personnel or under the jurisdiction of prisons and jails.

DOJ should require states to report disability-related data for all deaths reportable by law enforcement agencies, prisons, and jails.²³ It is estimated that disabled individuals (those with physical, developmental, intellectual, psychiatric, and emotional disabilities) comprise between a quarter and a half of people who die as a result of law enforcement encounters.²⁴ DOJ should consult with disability protection and advocacy organizations to develop a set of questions and/or categories to guide responses from reporting entities. If DOJ cannot complete these consultations before the start of FY 2020, when DCRA reporting is to commence, DOJ should add reporting requirements on disabilities to the FY 2021 reporting requirements.

The SPLC supports the inclusion of Question 11 on the CJ-13A form for federal law enforcement agencies to report DCRA data. This question asks whether the decedent made suicidal statements, appeared intoxicated, exhibited mental health problems, appeared to have trouble understanding or following verbal instructions, or exhibited a physical disability.²⁵ At a

²⁰ December 2016 Notice, *supra* note 1, at 91,950.

²¹ Justice Roundtable, Comment on Proposed Guidelines for Death in Custody Reporting Act Collection, at 3 (Feb. 17, 2017), <https://constitutionproject.org/wp-content/uploads/2017/02/DICRA-Coalition-Letter-Feb-2017-Final.pdf>.

²² The SPLC uses "under the jurisdiction" to refer to anyone who is held under the legal authority of the federal or a state or local government, even if the person is in the physical custody of a facility run by a different entity. *See* Danielle Kaebel & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 251211, at 5-6 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> (definitions of "prison jurisdiction population" and "prison custody population").

²³ *See* American Civil Liberties Union et al., Comments in Response to Notice Regarding Death in Custody Reporting Act Collection, at 5 (Aug. 8, 2018), <http://civilrightsdocs.info/pdf/criminal-justice/Letter-to-DOJ-DCRA-Guidance-August-2018.pdf>.

²⁴ *See* *Of All U.S. Police Shootings, One-Quarter Reportedly Involve the Mentally Ill*, NAT'L PUB. RADIO (July 4, 2015), <https://n.pr/1dEdkoe> (one quarter as a lower-bound estimate, based on police and family identifications of the deceased as "mentally ill"); David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: A Media Study (2013-2015) and Overview*, RUDERMAN FAMILY FOUND. 5, 7 (Mar. 2016), http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf (one-third to one-half of people who are killed by police are disabled).

²⁵ *Federal Law Enforcement Agency Deaths in Custody Reporting Program, 2018-2021*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., BJS-2018-14130, at 50, https://www.bjs.gov/content/pub/pdf/fleadcrp1821_sol.pdf (May 4, 2018).

minimum, DOJ should include the same question on the form for federal correctional agencies and contractors (CJ-13B) and the forms that state administering agencies will submit.

C. DOJ should revise the incident report forms to facilitate the collection of accurate information on deaths during law enforcement encounters.

DOJ's December 2016 proposed guidelines specified some of the details it planned to collect on the incident report forms (DCR-1A and DCR-1B).²⁶ In addition to adopting the December 2016 proposed guidelines, the SPLC urges DOJ to revise or add the following fields on incident report forms CJ-13A (for federal agencies) and DCR-1A (for state agencies, and based on the assumption that this form is similar to CJ-13A):

1. The names of all law enforcement agencies involved in the incident.

Currently, DOJ's incident report form for federal law enforcement agencies (CJ-13A) includes Question 18, "Did any other law enforcement agencies respond to calls for service related to this incident?" and the sub-question "If so, what types of jurisdictions did the other responding agencies cover (mark all that apply)?" and includes check boxes for federal, state, local, tribal, special/other jurisdictions, and unknown agencies.²⁷ Question 18 and the corresponding question on state incident report forms should be revised to "Were personnel from any other law enforcement agencies present at the scene of this incident?" If the answer is yes, the next sub-question should read, "If so, name the other law enforcement agencies whose personnel were present at the scene of this incident." DOJ should include the same questions on the state version of the law enforcement incident report form (DCR-1A).

It is not uncommon for multiple law enforcement agencies to plan joint raids on residences or commercial establishments, including the deployment of special weapons and tactics teams.²⁸ Revising these questions is necessary to ensure that DOJ, Congress, and the public are able to identify all law enforcement agencies involved in a fatal encounter. Without knowledge as to which law enforcement agencies are involved in fatal encounters, neither DOJ nor the public can hold agencies accountable.

2. The reason for the initial contact with law enforcement personnel.

Currently, DOJ's incident report form for federal law enforcement agencies (CJ-13A) includes Question 7, "What was the reason for the initial contact between the decedent and law enforcement personnel? (Mark only one)." The options are "Criminal investigation, specify type/purpose"; "General law enforcement response and patrol, specify observed behaviors"; "Inspections, specify type/purpose"; "Security and protection, specify type/purpose"; "Detention or transport to detention"; "Court operations"; "Warrant service, specify charge"; and "Other

²⁶ December 2016 Notice, *supra* note 1, at 91,951.

²⁷ *Federal Law Enforcement Agency Deaths in Custody Reporting Program*, *supra* note 25, at 51.

²⁸ See, e.g., Alice Speri, *New York Gang Prosecutions Use Conspiracy Charges To Criminalize Whole Communities*, THE INTERCEPT (June 7, 2018), <https://interc.pt/2Lx5v1N> (April 19, 2016 joint raid on an East Harlem public housing complex by the New York Police Department, the Federal Bureau of Investigation, the U.S. Department of Homeland Security, the U.S. Drug Enforcement Administration, and the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives).

reason for contact, specify reason.”²⁹ These options are vague and overlap with each other, which will confound the data DOJ seeks to collect. For example, assuming that DCR-1A (for state agencies) is similar to CJ-13A, it is unclear under DOJ’s current typology whether Philando Castile’s death on July 6, 2016 in Falcon Heights, Minnesota³⁰ should be coded as “Criminal investigation” because the police officer thought that Castile resembled a suspect description for a recent robbery, or as “General law enforcement response and patrol,” because the officer’s stated reason for the stop was that Castile’s car had an inactive brake light.³¹

DOJ should revise Question 7 and the corresponding question on the state version of the law enforcement incident report form (DCR-1A) to delineate more clearly between the different circumstances that could lead to a law enforcement encounter. A revised typology might be 1) (attempted) traffic stop; 2) (attempted) pedestrian stop; 3) execution of an arrest warrant; 4) execution of a search warrant; 5) response to a domestic disturbance call, hostage situation, or active-shooter situation; 6) transport to a detention facility; and 7) other (specify reason).

In addition to removing confusion as to how to answer this question, revising these fields would help DOJ 1) identify the most common law enforcement encounters that lead to deaths and 2) develop recommendations in its required report to Congress³² for how to reduce fatalities.

3. Whether the death was caused by a chokehold or other restraints placed on the decedent’s ability to breathe.

Currently, DOJ’s incident report form for federal law enforcement agencies (CJ-13A) includes Question 20, “If a weapon caused the death, what type of weapon caused the death? (Mark only one).”³³ The form does not include an option for “Hands/feet/fist,” even though Question 15, “At any time during the incident, did law enforcement personal use any weapons?” does include “Hands/feet/fist” as an option.³⁴ This option should be added to Question 20 and to the corresponding question on the state version of the law enforcement incident report form (DCR-1A). Since agencies can select multiple options in Question 15 for the weapons that were used during an encounter, it is necessary that agencies specify in Question 20 which of these weapons directly resulted in the decedent’s death. Adding a “Hands/feet/fist” option to Question 20 would capture data on deaths by asphyxiation caused by law enforcement officers’ use of force.

D. DOJ should conduct random audits of local law enforcement agencies that receive Byrne funds to assess their compliance with DCRA.

²⁹ *Federal Law Enforcement Agency Deaths in Custody Reporting Program*, *supra* note 25, at 49.

³⁰ Mitch Smith, *Video of Police Killing of Philando Castile is Publicly Released*, N.Y. TIMES (June 20, 2017), <https://nyti.ms/2sNLNwn>.

³¹ Julie Bosman & Mitch Smith, *Experts Weigh In on Video of Philando Castile Shooting*, N.Y. TIMES (June 21, 2017), <https://nyti.ms/2tPXvUs>.

³² Death in Custody Report Act § (2)(f)(2), 34 U.S.C.A. § 60105(f)(2) (West 2018).

³³ *Federal Law Enforcement Agency Deaths in Custody Reporting Program*, *supra* note 25, at 51.

³⁴ *Id.* at 50.

DOJ should conduct random audits of law enforcement agencies that receive direct funding through the Byrne Justice Assistance Grant Program to assess their compliance with DCRA.³⁵ Audits would provide DOJ an important tool for gauging the reliability of information it receives from states and send a signal to law enforcement agencies, prisons, and jails about the premium DOJ places on timely, accurate, and complete reporting. The Audit Division of DOJ's Office of the Inspector General regularly conducts audits of recipients of Office of Justice Programs grants³⁶ and is well-suited to the task of auditing Byrne grant recipients to measure their compliance with DCRA.

E. Assuming DOJ exercises its power to reduce a state's Byrne grant, DOJ should limit the number of times a state administering agency may avail itself of the "pre-penalty" option to no more than three fiscal years total.

DOJ stated in the December 2016 proposed guidelines that it would impose no limit on a state's ability to invoke the "pre-penalty" option, which would give state administering agencies³⁷ the ability to redirect the Byrne funds that would otherwise be withheld from the state to "use within the State to assess and improve its DCRA collection."³⁸

The SPLC proposes a cap of three total fiscal years in which states could choose the pre-penalty option, which is slightly different from the "three consecutive fiscal years" guideline proposed by previous commenters.³⁹ The reason for the difference is the SPLC's concern that state administering agencies may act in bad faith to take advantage of a three-consecutive-years guideline by, for example, failing to comply in Years 1, 3, 5, and 7 but showing compliance in Years 2, 4, and 6. That sort of compliance pattern would not violate a three-consecutive-years guideline, but it would violate the SPLC's proposed guideline. Imposing a maximum limit on use of the pre-penalty option would ensure that states could not indefinitely evade their DCRA obligations.

F. Assuming DOJ requires states to submit Data Collection Plans, DOJ should evaluate these plans as part of its determination of whether states are complying with DCRA.

In addition to requiring states to submit Data Collection Plans (see I.C), DOJ should evaluate the Data Collection Plans as part of its overall determination of whether a state is complying with DCRA.⁴⁰ The SPLC therefore disagrees with the statement in the December 2016 proposed

³⁵ In each state receiving Byrne funds, 40% of the state's allocation goes directly to local law enforcement agencies. See 34 U.S.C.A. § 10156(b)(2) (West 2018); see also Alexia D. Cooper, *Justice Assistance Grant Program, 2016*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. NCJ 250157, at 3, 5 (Sept. 2016), <https://www.bjs.gov/content/pub/pdf/jagp16.pdf> (direct awards to local law enforcement agencies).

³⁶ See *Office of Justice Programs Grant Audits*, U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., <https://oig.justice.gov/reports/ojp-ext.htm> (accessed Aug. 6, 2018).

³⁷ DOJ distributes several Office of Justice Programs grants, including Byrne grants, to state administering agencies, which set their own priorities for how grants are to be distributed within the states. See *State Administering Agencies*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, <https://ojp.gov/saa> (accessed Aug. 8, 2018).

³⁸ December 2016 Notice, *supra* note 1, at 91,951.

³⁹ Justice Roundtable, *supra* note 21, at 2.

⁴⁰ Death in Custody Report Act § (2)(c)(2), 34 U.S.C.A. § 60105(c)(2) (West 2018).

guidelines that DOJ “will not assess the merits of the [Data Collection Plans] for compliance purposes.”⁴¹ The Data Collection Plans will reveal whether states have established (or have plans to establish) lines of communication with *every* law enforcement agency, prison, and jail to ensure universal awareness of DCRA’s quarterly deadlines. Given the small size of most of the nation’s law enforcement agencies and their limited administrative capacity,⁴² it is likely that state reporting agencies will have to communicate proactively with small municipal police departments to ensure that they report timely, accurate, and complete data.

The Data Collection Plans will also reveal whether state reporting agencies will hold accountable those law enforcement agencies, prisons, and jails that fail to comply with DCRA. For example, the Byrne JAG Program requires state administering agencies to “pass through” a variable portion of Byrne funds to local law enforcement agencies, but leaves it to the state administering agencies to decide which local law enforcement agencies will receive these pass-through funds.⁴³ State administering agencies could adopt regulations or policies conditioning receipt of these pass-through Byrne funds on local law enforcement agencies’ compliance with DCRA. Another option is for state reporting agencies to conduct their own random audits of law enforcement agencies, prisons, and jails to assess their compliance with DCRA.⁴⁴ DOJ should not deprive itself of a valuable resource for assessing whether states are taking their DCRA obligations seriously.

G. DOJ should make public additional information on top of what it pledged to make public in its December 2016 proposed guidelines.

DOJ should make public *all* of the information Congress enumerated in DCRA as items that state governments and federal law enforcement agencies must report to DOJ,⁴⁵ including the gender, age, race, and ethnicity of deceased persons and the time and location of their deaths. These data are essential for determining whether people of certain racial and ethnic backgrounds are statistically significantly more likely to die in law enforcement encounters compared to others. If DOJ decides to collect data on other items of interest, such as disabilities of the deceased (see II.B), DOJ should also make public these data.

⁴¹ December 2016 Notice, *supra* note 1, at 91,951.

⁴² Nearly half of all law enforcement agencies employ fewer than ten full-time sworn officers; nearly three-quarters employ fewer than 25 full-time sworn officers. *Final Report of the President’s Task Force on 21st Century Policing*, OFF. OF CMTY. ORIENTED POLICING SERVS. 29 & tbl.1 (May 2015), <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>; Duren Banks et al., *National Sources of Law Enforcement Employment Data*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 249681, at 6 tbl.5 (Oct. 4, 2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>.

⁴³ 34 U.S.C.A. § 10156(c)(2), (e)(2) (West 2018); *see also* Cooper, *supra* note 35, at 5-6 (explanation of “pass-through” funds).

⁴⁴ American Civil Liberties Union et al., *supra* note 23, at 4.

⁴⁵ Congress required the following items to be collected: “(1) the name, gender, race, ethnicity, and age of the deceased; (2) the date, time, and location of death; (3) the law enforcement agency that detained, arrested, or was in the process of arresting the deceased; and (4) a brief description of the circumstances surrounding the death.” Death in Custody Report Act § (2)(b), 34 U.S.C.A. § 60105(b)(1)-(4) (West 2018), 18 U.S.C. § 4001 note (available at <https://www.law.cornell.edu/uscode/text/18/4001>).

III. DOJ should immediately make public 1) all guidelines for how federal law enforcement agencies are to report DCRA data and 2) reports on FY 2016 and FY 2017 DCRA data DOJ has already collected from federal agencies.

In October 2016, DOJ announced that Attorney General Loretta Lynch had issued a memorandum to federal law enforcement agencies regarding DCRA compliance.⁴⁶ This memorandum is not currently publicly available, so it is impossible to evaluate DOJ's instructions to federal law enforcement agencies and whether the data collection in FY 2016 and FY 2017 was robust. The SPLC urges DOJ to publish all guidelines and other memoranda to federal law enforcement agencies on their DCRA obligations so that the public can evaluate the process for collecting federal DCRA data.

In a separate solicitation for bids from contractors to administer data collection for FYs 2018-2021, DOJ noted that it plans to issue reports on the FY 2016 and FY 2017 data in 2018 and 2019, respectively.⁴⁷ Making these reports publicly available is especially urgent given recent reports suggesting that deaths in federal detention facilities are on the rise. In FY 2017, U.S. Immigration and Customs Enforcement (ICE) reported that twelve people died in federal immigration detention facilities, more than in any other year since FY 2009.⁴⁸ As of June 20, 2018, ICE reported five people had died in its facilities so far in FY 2018.⁴⁹ U.S. Customs and Border Protection employs nearly 37,000 full-time sworn officers,⁵⁰ making it the largest police force in the country⁵¹ and therefore a priority for congressional and public oversight.

Congress made its intent clear in DCRA⁵² that it wanted greater transparency and accuracy regarding data on deaths resulting from encounters with federal law enforcement officers⁵³ and occurring in federal detention facilities. The SPLC urges DOJ to publish the reports on FY 2016 and FY 2017 data as soon as practicable and publish all subsequent reports on a timely basis.

IV. DOJ should clarify how it has calculated the projected burden on respondent states.

⁴⁶ *Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFAIRS (Oct. 13, 2016), <https://www.justice.gov/opa/pr/justice-department-outlines-plan-enable-nationwide-collection-use-force-data>.

⁴⁷ *Federal Law Enforcement Agency Deaths in Custody Reporting Program*, *supra* note 25, at 5.

⁴⁸ *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, HUMAN RIGHTS WATCH 39 (June 20, 2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf.

⁴⁹ *Id.*

⁵⁰ Brian A. Reaves, *Federal Law Enforcement Officers, 2008*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 238250, at 2 tbl.1 (June 2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf>.

⁵¹ The New York Police Department employs approximately 36,000 officers. *About NYPD*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> (accessed Aug. 8, 2018); Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 233982, at 14 app.tbl.5 (July 2011), <https://www.bjs.gov/content/pub/pdf/cslla08.pdf>.

⁵² Death in Custody Report Act § (3), 18 U.S.C. § 4001 note (available at <https://www.law.cornell.edu/uscode/text/18/4001>).

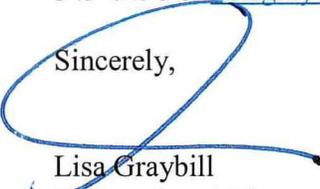
⁵³ *See, e.g., Tom Jackman & Michael Brice-Saddler, Family of Accountant Shot Dead by U.S. Park Police Officers Files \$25 Million Lawsuit*, WASH. POST (Aug. 3, 2018), <https://wapo.st/2M1y9Qa>.

The SPLC is unable to replicate DOJ's calculations for the estimated public burden associated with DCRA reporting. For example, DOJ estimates that that the 56 states and territories "will need an estimated 4.00 hours to complete each Quarterly Summary for a total of 4,480.00 hours."⁵⁴ Inexplicably, this estimate is twice the estimate of 2,240 hours DOJ included in its December 2016 notice.⁵⁵ Moreover, the SPLC believes that both the June 2018 and December 2016 estimates overstate the time states will spend completing Quarterly Summaries. Based on DOJ's assumption that an agency will require approximately 4 hours to complete a Quarterly Summary, the relevant calculation is (4 hours per summary per state) x (4 summaries per year per state) x 56 states = 896 hours per year, which is one-fifth of DOJ's June 2018 estimate and two-fifths of DOJ's December 2016 estimate.

The SPLC requests that DOJ spell out its calculations in greater detail to ensure that DOJ and the public can obtain a correctly calculated estimate of the burden imposed by DCRA reporting requirements that is based on defensible assumptions.

Thank you for your attention to this matter. If you have any questions, please contact me at 334-549-0498 or lisa.graybill@splcenter.org.

Sincerely,



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⁵⁴ June 2018 Notice, *supra* note 4, at 27,024.

⁵⁵ December 2016 Notice, *supra* note 1, at 91,952.