

October 3, 2016

Michael Planty
Deputy Director, Bureau of Justice Statistics
U.S. Department of Justice, OJP
810 Seventh Street, NW
Washington, DC 20531

Re: Docket Number 2016-18484

Dear Mr. Planty:

OpenTheGovernment.org and the undersigned organizations join a coalition of criminal justice, civil rights, human rights, faith-based, immigrant rights, LGBTQ, and open government organizations in expressing concern over the Justice Department's proposed implementation of the Deaths In Custody Reporting Act (DICRA), as published in the Federal Register on August 4, 2016.¹

The undersigned organizations are concerned that the DOJ proposal departs from DICRA provisions that *require* states receiving federal funding to proactively report information to the federal government regarding the death of any person in custody --detained, under arrest, in the process of being arrested, or incarcerated. The proposal does so by shifting the data collection and reporting requirements from the states to the Justice Department, and by making publicly-available information ("open-source review") the default initial source for DOJ's Arrest-Related Deaths (ARD) program.

The law was enacted almost two years ago, and guidance on the law's implementation is long overdue. This proposed guidance, however, does not meet the requirements of the statute. Instead of requiring, as the law does, that police departments be responsible for documenting and proactively reporting all cases of arrest-related deaths, it shifts the burden, to the DOJ Bureau of Justice Statistics (BJS), to compile lists of potentially relevant deaths -- based on publicly-available information. The BJS is then required to submit the list to state and local law enforcement agencies, which are tasked with confirming the list and reporting any additional ARD cases not identified by the BJS during its open-source review.

While media outlets such as the Guardian and the Washington Post have been critical to understanding police-civilian encounters over recent years, relying on media accounts and statistics is an inadequate method of collecting data to determine the circumstances under which people die while in law-enforcement custody.² Relying on open-sources-reporting to document ARD cases fails to account,

¹ Federal Register, Vol. 81, No. 150, DOJ, Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Arrest-Related Deaths Program, Aug. 4, 2016, available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18484.pdf>.

² A March 2015 BJS report acknowledges this problem, stating: "although some arrest-related deaths will be identified by monitoring local news, this method is not likely to be sufficient for identifying the full universe of reportable deaths." U.S. Department of Justice Bureau of Justice Statistics (March 2015), Arrest-Related Deaths Program Assessment: Technical Report, NCJ 248543: <http://www.bjs.gov/content/pub/pdf/ardpatr.pdf>.

moreover, for incidents that take place without any witness accounts or media coverage; incidents that are the most likely to go unreported by law enforcement.³

We strongly urge that the DOJ guidance include clear instructions and timelines for making information available to the public.⁴ The DICRA requires states to report information to the Attorney General on ARD cases on a quarterly basis; the Attorney General in turn has two years to analyze the data, determine if and how it can be used to reduce the number of such deaths, and file a report to Congress. We recommend the proposed rule expand on the requirements of the statute, and instruct law enforcement agencies to also make public the results of the quarterly data reports in order to ensure for greater oversight and accountability. Without timely, reliable, and publicly-accessible data, it is impossible to identify those states failing to report, or not reporting correctly.

As it stands, the proposed guidance does nothing to address law enforcement officials who refuse to publicly share the most basic facts about potential abuses. In accordance with the DICRA, the DOJ proposal should provide clear guidance on what constitutes noncompliance. The DOJ proposal should be revised to include clear guidance on the possible penalties authorized by DICRA for non-compliance and failure-to-report, and how they will be applied. Although the law allows the Attorney General to withhold up to 10% of federal funds for law enforcement operations in any state that fails to comply with the reporting requirements, any such penalties are issued at the discretion of the Attorney General. As a result, only a relatively small number of police departments comply.

Finally, the DOJ proposal does not indicate how *federal* law enforcement agencies will comply with DICRA although the DICRA applies to federal as well as to state and local agencies. The law is clear in its application to federal law enforcement, and the guidance should include details on how federal agencies, including the Customs and Border Protection (CBP), must comply with the statute. This represents a major gap in reported statistics, and should be remedied in the guidance.

Thank you for your attention to this matter. If you have any questions or would like to discuss this issue further, please contact Patrice McDermott, Executive Director of OpenTheGovernment.org at 202-332-6736 or pmcdermott@openthegovernment.org.

Sincerely,

American-Arab Anti-Discrimination Committee
American Civil Liberties Union
Bill or Rights Defense Committee
Center for Media and Democracy
Constitutional Alliance

³ Independent assessments also echo this concern, noting that the BJS-estimated annual average of 928 police homicides per year is likely to be much greater, and that the estimated 28% of all police homicides that go unreported is also likely much higher. See “BSJ Report on Arrest-Related Deaths: True Number Likely Much Greater,” Human Rights Data Analysis Group, March 4, 2015: <https://hrdag.org/2015/03/04/bjs-report-on-arrest-related-deaths/>.

⁴ In April, OTG submitted recommendations to the Justice Department, requesting the DOJ include a commitment in its 2016 Open Government Plan to issue guidance on the implementation of DICRA, including requirements for making information regularly available to the public: <http://www.openthegovernment.org/node/5185>.

The Constitution Project
Defending Dissent Foundation
Demand Progress
Government Accountability Project
Grassroots Leadership
Human Rights Data Analysis Group
Immigrant Legal Resource Center
Liberty Coalition
National Disability Rights Network (NDRN)
National Immigration Project of the National Lawyers Guild
Sunlight Foundation
Society of Professional Journalists
Project On Government Oversight