

September [XX], 2018

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Rod Rosenstein
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Laura Rogers
Assistant Attorney General
U.S. Department of Justice, OJP
810 Seventh Street, NW
Washington, DC 20531

Re: Comments in Response to Notice Regarding “Agency Information Collection Activities; Proposed eCollection eComments Requested; New collection: Death in Custody Reporting Act Collection,” 83 Fed. Reg. 44064 (August 29, 2018)

Dear Attorney General Sessions, Deputy Attorney General Rosenstein, and Assistant Attorney General Rogers:

On behalf of the [XXX undersigned organizations], we write to express our extreme disappointment with the Department of Justice’s (DOJ) continued delay in meeting its obligation to enforce the Death in Custody Reporting Act of 2013 (DCRA). The Department of Justice just closed a 60-day comment period regarding DCRA implementation on August 10, 2018.¹ On August 29, 2018, DOJ announced another 30-day comment period for DCRA, further delaying compliance with the law. According to the latest notice, DOJ plans to delay implementation of DCRA until Fiscal Year 2020, a full five years after it was signed into law and two years after DOJ last published its near-final compliance plan and guidelines (collectively “compliance guidelines”).²

DOJ’s delayed implementation of DCRA is unacceptable, as there continues to be an unreliable national census of custodial and arrest-related deaths, including national statistics on mortality rates, demographic impact, circumstances of these deaths, and implicated law enforcement agencies. Simply put, the federal government does not know how many people are killed by law enforcement every year. Instead, police-caused fatalities are tracked by outlets like The Washington Post, which estimates 3,538 people have been killed by police since DCRA was enacted in December 2014.³ Knowing the number and circumstances of police-caused fatalities is crucial to developing policies that could reduce the number of such fatalities. This data is also critical to providing the public and DOJ the information needed to ensure law enforcement agencies are complying with civil rights laws, and to assisting DOJ with fulfilling its enforcement responsibilities.

We recommend the immediate adoption of the compliance guidelines that were published in the Federal Register on December 19, 2016, which reflect comprehensive deliberation and public engagement by DOJ to enforce DCRA.

I. Mandatory Collection of Data on Police-Involved Deaths Has Long Enjoyed Bipartisan Support

DCRA was enacted on December 18, 2014.⁴ The law reauthorized the Death in Custody Reporting Act of 2000,⁵ which had expired in 2006, and expands the information collection to include mandatory data collection of custodial and arrest-related deaths from states receiving federal Byrne Justice Assistance Grant (Byrne JAG) funding and from federal law enforcement agencies. The law also requires the Attorney General to adopt guidelines directing state compliance with the law. DCRA's consideration and passage was uncontroversial and garnered strong bipartisan support,⁶ given the uncontroverted need for an accurate and reliable national census of these data. The bill was reported favorably out of the House Judiciary Committee by Chairman Bob Goodlatte (R-VA-6)⁷ and passed the Republican-controlled House on suspension.⁸ In the Senate, the bill was reported favorably by then-Chairman Pat Leahy (D-VT), and passed the full Senate by unanimous consent.⁹

II. DOJ Has Already Undertaken Comprehensive Notice and Comment Periods and Released Compliance Guidelines that Reflect Public Input

In 2016, DOJ undertook two notice and comment periods to adopt the compliance guidelines required by DCRA, first on August 4, 2016,¹⁰ and again on December 19, 2016.¹¹ Stakeholders, including our organization, reviewed and provided comments during both comment periods. We are aware of at least 49 organizations that weighed in on the compliance guidelines.¹² DOJ developed a vigorous compliance program that was nearly final and compliance enforcement was intended to begin in October 2017.¹³

Given these circumstances, we find no sufficient reason for DOJ to start a new process to enforce DCRA, further delaying implementation of the law and the public benefit of the information collection. Furthermore, if DOJ planned to start a new DCRA implementation process that process should have begun in January 2017, given the timely compliance required by the statute beginning with the fiscal year that began “not more than 120 days from the date of enactment,”¹⁴ which was FY 2016. And as 2017 progressed without DCRA implementation, at the very least, DOJ should have informed stakeholders of the status of DCRA.

III. Recommendations for the Implementation of the Death in Custody Reporting Act of 2013: DOJ Should Proceed with the December 2016 Compliance Guidelines

We continue to advance the recommendations we submitted during the previous 2016 public comment periods, which were largely reflected in the December 2016 compliance guidelines published by DOJ.¹⁵ Specifically, we support the hybrid model of data collection that was developed by DOJ and proposed therein.

The hybrid model adopted by the December 2016 compliance guidelines was based on a redesign study by the Bureau of Justice Assistance (BJS) to improve its arrest-related deaths data collection program (ARD Program) as well as recommendations submitted to DOJ through public comment. It became clear after a 2015 technical review by BJS of its ARD Program that the program at that time collected fewer law enforcement homicide deaths than expected—only an estimated rate of 49 percent.¹⁶ BJS attributed the low reporting rate to the methodology used to obtain the data, in particular citing incomplete reporting by states as the predominant reason for the substantial coverage error of its ARD Program.¹⁷ To remedy this, BJS tested a new methodology in a redesign study whereby it used open source methods to identify additional, unreported deaths.¹⁸ BJS reported that this new hybrid methodology of state reporting combined with open-source research greatly increased the accuracy and completeness of its ARD Program outcomes.¹⁹

In addition to the improved hybrid methodology of data collection that was developed by BJS, the passage of DCRA addressed the sporadic and varied nature of past state reporting by establishing an affirmative legal obligation for states receiving Byrne JAG funding to report all custodial and arrest-related deaths. Based on BJS's findings and the data collection mandate on states established by DCRA, we made several recommendations that we believe help ensure the most reliable, accurate, and complete set of data from states.²⁰ The December 2016 compliance guidelines included many of these recommendations, and we strongly encourage DOJ to proceed with implementing DCRA by adopting those guidelines.

By comparison, the June 2018 plan proposed by DOJ does not provide any information; there is literally no guidance provided other than reference to the statutory language of DCRA and a delayed implementation date of FY 2020. It bypasses the comprehensive findings and recommendations of BJS's technical review and redesign study, as well as the public deliberation that was undertaken during the 2016 comment periods. There is simply no justification for this.

For these reasons, we reiterate our previous recommendations.

A. Require States to Proactively Report All In-Custody Deaths to DOJ

States should be required to initially report all arrest-related and custodial deaths to DOJ in conformance with their legal obligation under DCRA. DOJ should then use open source research to identify arrest-related and custodial deaths for purposes of comparison and supplementation. This hybrid methodology recognizes state obligations to proactively report arrest-related deaths to the federal government, allowing states to develop dedicated programs and resources to fully comply with their reporting obligations under DCRA. DOJ's supplemental open source research provides appropriate federal oversight in this context and can confirm or reject a state's accounting.

We believe full and accurate initial reporting by states is the best way to capture complete national data. Congress intended the responsibility of data collection and reporting to lie with states, rather than with DOJ, by requiring that states “shall report to the Attorney General” information on any custodial or arrest-related deaths that occur within its borders.²¹ Statements from the 2000 and 2013 bill’s sponsors confirm this understanding.²² Congress recognized that local law enforcement agencies are the entities closest to the data being sought and are uniquely positioned to capture information on arrest-related and custodial deaths, quickly and comprehensively. The December 2016 compliance guidelines adopted this recommended variation to BJS’s hybrid approach: it requires affirmative, initial reporting by states, followed by open source research by DOJ to supplement the state data, and a final follow up with states to capture any underreporting. Again, we believe this is the most reliable method of obtaining complete and quality national data.

B. Compliance Guidelines Should Direct States to Adopt Compliance Plans

We support the December 2016 proposal that requires states to set up compliance plans. The state compliance plans address our previous recommendation that states set up individual compliance systems or programs. Under the December 2016 guidelines, each state is required to submit a data collection plan to DOJ summarizing how it would collect the information that DCRA requires on a quarterly basis in a manner that achieves maximum timeliness, accuracy, and completeness.²³ These state plans would help greatly to facilitate data collection from local agencies to the state and reporting of the information to DOJ. We additionally recommend that the state plans include specific procedures for collecting information on reportable deaths, as well as audits of state reporting to ensure full compliance.

C. Penalties for Noncompliant States

We also urge DOJ to detail how and when penalties will be applied if a state does not comply with DCRA reporting requirements, and adopt the penalty proposed in the December 2016 compliance guidelines. Subsection (c)(2) of DCRA gives the Attorney General the power to reduce up to 10 percent of Byrne JAG funds in the event of noncompliance.²⁴ Congress included this penalty after observing, over multiple years, inadequate reporting under the Death in Custody Reporting Act of 2000, and recognizing the importance of full compliance.²⁵ We believe the financial penalty is absolutely critical to DOJ’s successful implementation of DCRA, as reporting programs without such enforcement mechanisms have failed to result in complete and reliable data collection.

An unenforced reporting obligation will fail to provide a complete picture of the extent and scope of custodial and arrest-related deaths in the United States. Indeed, as noted, DOJ’s ARD Program failed to capture hundreds of deaths each year: Even when using the hybrid open

source review methodology to supplement voluntary reporting, the ARD Program captured only 69 percent of expected arrest-related deaths between 2009 and 2011. DOJ should adopt the December 2016 compliance guidelines which reduced states' Byrne JAG funding up to 10 percent for failure to fully comply with DCRA.

D. Establish Clear Parameters that Define What is Reportable Under DCRA

DOJ should provide a clear delineation of reportable deaths under DCRA, particularly those instances where a death occurs without an arrest. DCRA requires states and federal law enforcement agencies to report information about the death of anyone “detained, under arrest, or is in the process of being arrested, is in route to be incarcerated, or is incarcerated.”²⁶ The June 2018 compliance guidelines define “reportable death” to generally include “deaths 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.”²⁷

To further ensure standardized reporting from states, DOJ should provide a list of circumstances that qualify as reportable deaths, a step that we recommended in previous comments and which was adopted by the December 2016 compliance guidelines. For example, the December 2016 compliance guidelines include as reportable deaths any deaths that occur due to any use of force by law enforcement personnel, while a decedent's freedom to leave is restricted by law enforcement prior to, during, or following an arrest, such as during investigative detentions or *Terry* stops, and other specific circumstances. This type of guidance will help reduce variations and ensure inclusivity in data reporting by states.

E. Develop Guidelines for the Collection of Information on Decedents' Disability

The collection of disability-related data is critical and the guidelines for DCRA's implementation should reflect that importance. Existing information indicates that, nationwide, hundreds of people with disabilities are killed every year during police interactions, representing as many as half of all fatal police shootings.²⁸ Media accounts describe fatal outcomes when persons with autism, intellectual disabilities, or psychiatric disabilities, or persons who are deaf or hard of hearing, are unable to immediately follow police directions due to their disabilities.²⁹ People of color with disabilities appear to be particularly overrepresented among this group. When reviewing data about arrest-related deaths and other deaths in custody, it is essential that the Department collect and analyze information about the intersection of disability, race, and ethnicity. We welcome a collection instrument that inquires whether the decedent made suicidal statements, appeared to be under the influence of drugs or alcohol, exhibited mental health problems, or had any noticeable physical disability, such as whether the decedent used a wheelchair.

Additionally, to the extent that DOJ will use the ARD Program to check data provided by states, it should seek out and incorporate information available from additional sources, such as data made available as a result of the investigations, monitoring, and/or settlements of DOJ's Civil Rights Division.³⁰ DOJ should also consult with the protection and advocacy agencies in each state and should seek information held by community-based disability organizations, such as the national and affiliate organizations of the Autistic Self Advocacy Network, the National Alliance on Mental Illness, and the Arc.

IV. Conclusion

Congress spoke decisively on the importance of these data when it enacted DCRA. In the years since DCRA's enactment, thousands of people have continued to be killed by police in the U.S. Between June 2015 and May 2016, BJS identified an estimated 1,900 arrest-related deaths, and it is likely this number grossly underestimates the number of arrest-related deaths due to the unstandardized data collection process across the states.³¹ Yet, after robust comment periods and public engagement to develop the compliance guidelines required by DCRA and fully enforce the law, DOJ has chosen to begin the process anew, without sufficient justification. Without an accurate and complete set of data documenting the number, circumstances, and characteristics of police-involved killings, effective policies to combat this problem are less likely. This information is crucial to DOJ's ability to enforce federal civil rights laws. The public, and DOJ, needs these data now.

Sincerely,

cc: Chris Casto, Senior Policy Advisor, Department of Justice, Office of Justice Programs

¹ Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Death in Custody Reporting Act Collection, 83 Fed. Reg. 27,023, 27,024 (June 11, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-11/pdf/2018-12503.pdf>.

² Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Death in Custody Reporting Act Collection, 83 Fed. Reg. 44,064, 44,065 (Aug. 29, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-11/pdf/2018-12503.pdf>.

³Julia Tate et al., *Data-Police-Shootings*, WASHINGTON POST, <https://github.com/washingtonpost/data-police-shootings> (last visited Aug. 1, 2018).

⁴ Death in Custody Reporting Act of 2013, 34 U.S.C.A. §60105 (formerly codified as 42 U.S.C.A. §13727) (West 2017).

⁵ Death in Custody Reporting Act of 2000, 34 U.S.C.A. §12104 (formerly codified as 42 U.S.C.A. § 13704) (West 2017).

⁶ See *infra* text accompanying notes 6-8; see also 159 CONG. REC. H8047-H8049 (daily ed. Dec. 12, 2013) (statements of Rep. Collins (R-GA-9), Rep. Conyers (D-MI-13), and Rep. Jackson Lee (D-TX-18)).

⁷ H.R. REP. NO. 113-285, at 2 (2013).

⁸ 159 CONG. REC. H8049 (daily ed. Dec. 12, 2013).

⁹ 160 CONG. REC. S6580 (daily ed. Dec. 10, 2014).

¹⁰ Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Arrest-Related Deaths Program, 81 Fed. Reg. 51,489 (Aug. 4, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18484.pdf>.

¹¹ Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Death in Custody Reporting Act Collection, 81 Fed. Reg. 91,948 (Dec. 19, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30396.pdf>.

¹² See Coalition Comments from Justice Roundtable to Acting Assistant Att’y Gen. Alan Hanson & Senior Advisor Chris Casto (Feb. 17, 2017), https://www.aclu.org/sites/default/files/field_document/dicra_coalition_letter_feb_2017_final.pdf.

¹³ Death in Custody Reporting Act Collection, 81 Fed. Reg. at 91,952.

¹⁴ 34 U.S.C.A. §60105(c)(1).

¹⁵ Death in Custody Reporting Act Collection, 81 Fed. Reg. at 91,949, 91,951.

¹⁶ See BUREAU OF JUSTICE STATISTICS, ASSESSMENT OF COVERAGE IN THE ARREST-RELATED DEATHS PROGRAM 1 (Oct. 2015), <https://www.bjs.gov/content/pub/pdf/acardp.pdf>.

¹⁷ *Id.* at 3.

¹⁸ BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS PROGRAM REDESIGN STUDY, 2015-16: PRELIMINARY FINDINGS (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf>.

¹⁹ *Id.*

²⁰ Letter from ACLU et al. to Loretta Lynch, U.S. Att’y Gen, et al., U.S. Dept. of Justice (Oct. 3, 2016) (on file with ACLU).

²¹ 34 U.S.C.A. §60105(a).

²² See 146 CONG. REC. 15,892 (2000) (statement of Rep. Hutchinson); Press Release, Office of Representative Bobby Scott, Scott Statement on the Signing of Death In Custody Reporting Act of 2013 into Law by President Obama (Dec. 18, 2014), <https://bobbyscott.house.gov/media-center/press-releases/scott-statement-on-the-signing-of-death-in-custody-reporting-act-of-2013>.

²³ Death in Custody Reporting Act Collection, 81 Fed. Reg. at 91,949.

²⁴ 34 U.S.C.A. §60105(c)(2).

²⁵ See 160 CONG. REC. S6579-S6580 (daily ed. Dec. 10, 2014) (statement of Sen. Leahy); see also Nick Otto, *Congress Is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, Mother Jones (Dec. 17, 2014), <https://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner/>.

²⁶ 34 U.S.C.A. §60105(a).

²⁷ Death in Custody Reporting Act Collection, 83 Fed. Reg. 27,023, 27,024.

²⁸ David M. Perry & Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability* (2016), http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

²⁹ Mary O’Hara, *Up to half of people killed by US police are disabled*, THE GUARDIAN (Mar. 29, 2016), <https://www.theguardian.com/society/2016/mar/29/media-must-report-police-violence-towards-disabled-people>.

³⁰ See, e.g., Consent Decree, U.S. v. Baltimore, 1:17-cv-00099-JKB (E.D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download>.

³¹ ARREST-RELATED DEATHS PROGRAM REDESIGN STUDY, *supra* note 18, at 2.