



June 17, 2021

VIA ELECTRONIC MAIL – FOIA@HQ.DHS.GOV

U.S. Department of Homeland Security
Privacy Office, Mail Stop 0655
2707 Martin Luther King Jr. AVE SE
Washington, DC 20528-065

Freedom of Information Act Request: Immigration Enforcement and Release of Detainees from Detention

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, to educate the public.

I. Introduction

Since the Biden-Harris Administration has taken office, illegal immigration along the southwest border of the United States has increased exponentially to record levels. While many were able to predict that measures like suspending the Migrant Protection Protocols Program,¹ or announcing a 100-day pause on deportations²

¹ Department of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> (last visited June 16, 2021). MPP has since been officially terminated. Department of Homeland Security, *Termination of the Migrant Protection Protocols Program*, https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf (last visited June 16, 2021).

² Department of Homeland Security, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf (last visited June 16, 2021).

would lead to an increase in illegal immigration, DHS’s own numbers demonstrate just how dramatic the ensuing immigration surge has been.

U.S. Customs and Border Protection (“CBP”) reports that encounters of unaccompanied alien children (“UAC”) at the United States / Mexico border rose by over 400% comparing November 2020 to March 2021.³ Digging further into the numbers, one sees that encounters were relatively stable between November and December with a slight increase in January.⁴ Between January and February, however, the encounters of UAC jumped from 5,850 to 9,429.⁵ Then, in March, the encounters more than doubled to an all-time high of 18,951.⁶ And since then, there has not been much of a trail off as CBP encountered 17,148 UAC in April and 14,158 more in May.⁷

This same trend exists for CBP’s encounters of family units (designated “FMUAs” by CBP). Over the same time, encounters of family units at the Southwest Border spiked by more than 1,000%.⁸ While encounters of FMUAs were relatively stable from November to December, with a slight uptick in January, the numbers grew exponentially after that.⁹ In February, the first full month after the Administration’s new announced policies, CBP encountered 19,588 FMUAs.¹⁰ In March, that number nearly tripled as CBP recorded 54,115 FMUA encounters.¹¹ Similar to the UAC trend line, the number of FMUA encounters has remained near record levels since March. In April, CBP recorded 50,094 FMUA encounters and 44,639 in May.¹²

Even more alarming, DHS appears to have stopped detaining many aliens who have crossed the border illegally. Even though there has been a dramatic rise in CBP encounters of FMUAs at the Southwest Border—the overwhelming majority of which involve the Border Patrol, indicating encounters of people who have crossed between Ports of Entry (i.e., illegally)—U.S. Immigration and Customs Enforcement (“ICE”)

³ U.S. Customs and Border Protection, *Southwest Border Land Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (selecting FY 2021 as the Fiscal Year, and Title 8 as the Title of Authority and UC as the Demographic) (last visited June 15, 2021).

⁴ *Id.* CBP recorded 4,599 UAC encounters in November, 4,992 in December, and 5,850 in January 2021.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (selecting 2021 as the Fiscal Year and FMUA as the Demographic).

⁹ *Id.* CBP recorded 4,302 FMUA encounters in November, 4,404 in December, and 7,296 in January 2021.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

has no correlating increase in family units being detained.¹³ It seems as if the Biden Administration has resumed the disastrous “catch-and-release” policy that served as a tremendous pull factor during the Obama Administration.

And if suspending removals, MPP, and resuming catch-and-release were not enough, the Biden Administration recently announced it is bringing back, and expanding, the blatantly unlawful Central American Minors (“CAM”) Program.¹⁴ Under CAM, illegal aliens now residing inside the United States—including recipients of deferred action and those who have merely applied for asylum—can petition the government to ‘parole’ into the United States any relative over whom they assert guardian status. A larger magnet for illegal immigration could not be envisioned: sneak across the border, gain a foothold in the United States, and then the government will then bring in the rest of your family.

This constitutes a crisis of unimaginable proportions, one that is driving considerable public debate and interest. Meanwhile, the American people are receiving mixed messages from the Biden Administration. On Vice President Harris’s recent trip to Guatemala, she told a crowd that the message from the United States was clear, “do not come.”¹⁵ This statement contrasts sharply with the policies the administration is pursuing, one that is clearly incentivizing migrants to come to the border (as can be seen in the drastic rise in encounters). Further, it contrasts with the Vice President’s own statements she made to explain the “do not come” message. After receiving political backlash, she later walked back her comments saying that she was “committed” to ensuring the United States was a “safe haven” for those seeking asylum.¹⁶ This messaging, combined with the administration’s actions, leaves Americans confused as to what the policy of the Administration is. Doubly so given that there seems to be one set of messaging in English, and another, softer set given only to Spanish language outlets.

¹³ U.S. Immigration and Customs Enforcement, *ICE Detention Data, FY21 YTD*, https://www.ice.gov/doclib/detention/FY21_detentionStats210513.xlsx (at the Tab entitled “Detention FY21 YTD”) (last visited June 16, 2021).

¹⁴ United States Department of State & United States Department of Homeland Security, *Joint Statement by the U.S. Department of State and U.S. Department of Homeland Security on the Expansion of Access to the Central American Minors Program*, <https://www.state.gov/joint-statement-by-the-u-s-department-of-state-and-u-s-department-of-homeland-security-on-the-expansion-of-access-to-the-central-american-minors-program/> (last visited June 16, 2021).

¹⁵ Katherine Doyle, *Harris Tones Down ‘Do Not Come’ Message in Interview with Spanish-Language News Service*, YAHOO! NEWS (June 11, 2021), <https://news.yahoo.com/harris-tones-down-not-come-194500355.html> (“If you come to our border, you will be turned back. I want to be clear to folks in this region who are thinking about making that dangerous trek to the United States-Mexico border. Do not come. Do not come. The United States will continue to enforce our laws and secure our border.”).

¹⁶ *Id.* (“Back in Washington, Harris dialed back the message, telling EFE, a Spanish international news agency, she was ‘committed’ to ensuring the United States is a ‘safe haven’ for people seeking asylum.”).

Given the magnitude of the crisis on the border, the importance Americans place on immigration as a policy issue, and the confused messaging that the administration is producing, AFL seeks records to clarify these policies for the American people. Therefore, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests the following records within twenty business days.

II. Requested Records

A. All records, including but not limited to electronic mail, texts, memoranda, and handwritten notes, of, regarding, referring, or relating to Executive Order 14010, including but not limited to the development and implementation of that order, from, to, or in the possession of each of the following Department of Homeland Security components:

1. Office of the Secretary
2. Office of the Executive Secretary
3. Management Directorate
4. Office of Strategy, Policy, and Plans
5. Office of Intelligence and Analysis
6. Office of the General Counsel
7. Office of Legislative Affairs
8. Office of Public Affairs
9. Office of Partnerships and Engagement
10. Office of Operations Coordination
11. Office for Civil Rights and Civil Liberties
12. Office of the Citizenship and Immigration Services Ombudsman
13. Privacy Office
14. Office of the Immigration Detention Ombudsman

The timeframe for this request is January 20, 2021, to the date the records request is processed.

B. All records and communications regarding, referring, or relating to any decisions to terminate or discontinue the use of Title 42. The timeframe for this request is January 20, 2021, to date the records request is processed.

C. All communications regarding, referring, or relating to the development or implementation of the memorandum entitled “Termination of the Migrant Protection Protocols Program” signed by Secretary Alejandro Mayorkas, on June 1, 2021. The timeframe for this request is January 20, 2021, to date the records request is processed.

D. All communications regarding, referring, or relating to any policy, decision, practice, or instruction to have CBP stop transferring aliens apprehended at

the border to U.S. Immigration and Customs Enforcement (“ICE”). The timeframe for this request is January 20, 2021, to date the records request is processed.

- E. All communications between DHS staff in the Office of the Secretary or the Office of Policy and any staff at CBP relating to the effect that the implementation of EO 14010, the termination of MPP, the practice of releasing aliens to the interior of the country instead of transferring to ICE for removal, or the termination of Title 42 removals would have on migration to Southwest Border or the ensuing workload that CBP would experience. The timeframe for this request is January 20, 2021, to date the records request is processed.
- F. All documents and communications, including any communications with the Department of State, regarding, referring, or relating to resuming or expanding the Central American Minors Program. The timeframe for this request is January 20, 2021, to date the records request is processed.
- G. Documents sufficient to support the Administration’s claims that bringing Central American residents to the United States will “address the challenges of irregular migration throughout North and Central America.”¹⁷
- H. All calendar items for Secretary Mayorkas since his confirmation to be Secretary. This is meant to include the attendees and their affiliation, and any materials attached to the invitation or sent ahead of the meeting, any agenda created for the meeting, and any minutes made or kept of the meeting and distributed afterwards.
- I. All calendar items for the Chief of Staff, any and all Deputy Chief(s) of Staff and any Front Office Counselors, Advisors, or Senior Advisors since January 20, 2021. This is meant to include the attendees and their affiliation, and any materials attached to the invitation or sent ahead of the meeting, any agenda created for the meeting, and any minutes made or kept of the meeting and distributed afterwards.
- J. All calendar items for the Office of the Deputy Secretary from January 21, 2021, to the date this request is processed. This is meant to include the attendees and their affiliation, and any materials attached to the invitation or sent ahead of the meeting, any agenda created for the meeting, and any minutes made or kept of the meeting and distributed afterwards.
- K. All calendar items for Kelli Ann Burriesci, Joel T. Meyer, Serena Hoy, David Shahoulian, and Adam Hunter from January 20, 2021, to the date this request

¹⁷ United States Department of State & United States Department of Homeland Security, *supra* note 14.

is processed. This is meant to include the attendees and their affiliation, and any materials attached to the invitation or sent ahead of the meeting, any agenda created for the meeting, and any minutes made or kept of the meeting and distributed afterwards.

L. All calendar items for Eva Millona from the date she became the Assistant Secretary for the Office of Partnerships and Engagement to the date this request is processed. This is meant to include the attendees and their affiliation, and any materials attached to the invitation or sent ahead of the meeting, any agenda created for the meeting, and any minutes made or kept of the meeting and distributed afterwards.

M. All documents and communications related to Executive Order 14010 or Administration or Departmental immigration priorities to, from, or in the possession of the following custodians:

1. Alejandro Mayorkas
2. David Pekoske
3. Karinda L. Washington
4. Marsha Espinosa
5. David Gersten
6. Karen Olick
7. Clarissa Kornell
8. Kelli Ann Burriesci
9. Michelle Brané
10. Sarah Peck
11. Heather Fluit
12. Katherine Culliton-González
13. Britton Yee
14. Brian Hyer
15. Jason Mayer
16. Traci Silas
17. Alexandra Carnes
18. Harlan Geer
19. Eva Millona
20. Joel T. Meyer
21. David Shahoulian
22. Adam Hunter
23. Serena Hoy
24. Robert Paschall
25. David Cloe

The time frame for this request is January 20, 2021, to the date the records request is processed, and the search terms identified below should be queried in each custodian's records.

III. Redactions and Search Terms

Redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass 'n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, then DHS must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; *see also Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, DHS should produce email attachments.

The search terms for our requests should include, but not be limited to, all the following:

1. "Executive Order 14010"
2. "EO 14010"
3. "E.O. 14010"
4. "Immigration" & "Priorities"
5. "Terminate" & "MPP"
6. "Title 42"
7. "Detain"
8. "Alternatives to Detention"
9. "Parole"
10. "Central American Minors"
11. "CAM Program"
12. "Asylum"

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term "record" in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained

in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11, AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your

records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest.

The Department of Homeland Security, the federal courts, and the text of the Freedom of Information Act (as amended) all agree that a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."¹⁸ AFL meets these three criteria.

AFL gathers information of potential interest to the public through a variety of channels, including tips we receive from the public and FOIA requests that we submit to various government agencies. We then use our editorial skill to turn these documents and tips into a distinct work, partly through editorial commentary on them, including press releases.¹⁹ We then distribute that information to the public through our social media presence, appearances on cable television shows, and publication on our website. We also ensure that documents we uncover will be written about and covered by other outlets. This satisfies the standard for distribution established by the D.C. Circuit in *Cause of Action v. FTC*.²⁰ Together, these three factors establish that AFL is a news requester entitled to a waiver of fees under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11.

Second, waiver is proper because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government." The Department of Homeland Security defines a public interest request as one that would provide information that "concerns identifiable operations or activities of the federal government . . . [is] meaningfully informative about government operations or activities . . . , contribute[s] to the understanding of a reasonably broad audience of persons interested in the subject, . . . [and the] public's understanding of the subject in question must be enhanced by the disclosure to a significant extent."²¹

Here, the request seeks information surrounding the implementation of specific policy documents and specific events, which are discrete and identifiable operations

¹⁸ *Cause of Action v. FTC*, 799 F.3d 1108, 1120 (D.C. Cir. 2015). *See also*, 5 U.S.C. § 552(a)(4)(A)(ii); 6 C.F.R. § 5.11.

¹⁹ "[I]f an entity . . . issues substantive press releases concerning the documents it uncovers, or even if it simply provides editorial comments on those documents in interviews with newspapers, such a gloss on the underlying materials could satisfy this element of the definition." *Cause of Action*, 799 F.3d at 1122.

²⁰ *Id.* at 1116 "[P]roof of the ability to disseminate the released information to a broad cross-section of the public is not required."

²¹ 6 C.F.R. § 5.11(k)(2).

and activities of the federal government. These records would provide information that is informative about the way these policies were devised and implemented, information that is currently lacking. It would inform a broad segment of the public, as a Pew Research poll has shown that 52% of voters considered immigration a top priority.²²

The current head of immigration policy (Vice President Harris) has issued conflicting statements on the matter in recent days, and the policy on the ground at the border is, to say the least, at odds with the explanations given. In sum, the records requested would clearly enhance the public understanding of the situation in a significant way.

V. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis.

If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VI. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at info@aflegal.org. Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Thank you,

/s/ Gene P. Hamilton
Gene P. Hamilton
America First Legal Foundation

²² Pew Research Center, *Important Issues in the 2020 Election*, <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/> (last visited June 15, 2021).