



July 27, 2021

VIA ELECTRONIC MAIL & DHS PAL – FOIA@HQ.DHS.GOV

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

Freedom of Information Act Request: Information Regarding Catch-and-Release Practices and Issuances of Notices to Appear.

Dear FOIA Officer:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law in the United States by preventing Executive Branch overreach, ensuring due process and equal protection for all Americans, and advancing public knowledge and understanding of individual rights guaranteed under the Constitution and laws of the United States. AFL’s mission includes gathering official information, analyzing it, and disseminating it through reports, articles, press releases, emails, and/or through electronic media, including social media platforms.

I. Introduction

The Biden Administration has deployed a series of policies that have decimated the security of our southern border. The number of encounters with illegal aliens along the border are at historic levels, with encounters totaling 173,265 in March, 178,850 in April, 180,641 in May, and 188,829 in June.¹ And while it has generally maintained the use of Title 42 for single adults, nearly every member of a family unit or unaccompanied alien child that Department of Homeland Security (“DHS”) encounters along the border is processed and released into the United States—instead of being rapidly expelled under Title 42, or for eligible aliens, removed pursuant to the expedited removal authority in 8 U.S.C. § 1225.

¹ See U.S. Customs and Border Protection, *Southwest Border Land Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited July 23, 2021).

And even more disturbingly, it appears as though the Biden Administration has decided to fulfill the calls of open-borders radicals by redeploying the failed “catch and release” policies of the Obama Administration.

Not detaining aliens guarantees one thing: they will never be deported. Conversely, detaining aliens for the limited duration of their removal proceedings ensures that those without viable claims are deported from the United States. Although common sense should lead to such a conclusion, DHS’s own statistics undoubtedly prove that to be the case. *See generally* U.S. Department of Homeland Security, *Enforcement Lifecycle Reports*, <https://www.dhs.gov/immigration-statistics/special-reports/enforcement-lifecycle> (last visited July 23, 2021).

But the Biden Administration has taken catch-and-release practices to the next level, and is apparently not even issuing illegal border crossers charging documents to initiate removal proceedings in immigration court.² Apparently, for some portion of aliens not subject to rapid expulsion under Title 42, the Administration has elected to simply release them after a short encounter and let them go on their way.³ In other words, the Administration apparently believes that U.S. Customs and Border Protection’s (“CBP”) Border Patrol Agents are but a mere welcoming committee for anyone who cares to break our laws. As expected, these illegal aliens disappear once they reach the interior of the United States, a situation worsened by the near complete stoppage of Immigration and Customs Enforcement (“ICE”) enforcement actions in the interior of the country.⁴

These aliens are instead apparently given instructions to report to an ICE office at a later date to pick up their Form I-862, “Notice to Appear” (NTA). Unsurprisingly, an increasing number of them are not showing up to these appointments, and ICE does not know where they are. This fact has not changed any of the policy at the border

² Julia Ainsley, Dasha Burns and Jody Hammond, *Amid Surge, Border Agents in Rio Grande Valley Are Releasing Migrants Without Court Dates*, NBC NEWS, <https://www.nbcnews.com/politics/immigration/amid-surge-border-agents-rio-grande-valley-now-releasing-migrants-n1261720> (March 22, 2021).

³ Stephen Dinan, *EXCLUSIVE: Most Illegal Immigrants Are No-shows After Catch-and-release*, THE WASHINGTON TIMES, <https://amp.washingtontimes.com/news/2021/jul/13/catch-and-release-migrants-defy-homeland-security/> (Jul. 13, 2021).

⁴ Andrew Arthur, *Biden's DHS Is Abolishing ICE Without Abolishing ICE*, CENTER FOR IMMIGRATION STUDIES, <https://cis.org/Arthur/Bidens-DHS-Abolishing-ICE-Without-Abolishing-ICE> (Feb 10, 2021). Andrew R. Arthur, *ICE Interior Detentions Drop Like a Rock*, CENTER FOR IMMIGRATION STUDIES, <https://cis.org/Arthur/ICE-Interior-Detentions-Drop-Rock> (July 10, 2021); Adam Shaw, *Rep. Biggs Slams 'Unacceptable' Limits on ICE Arrests, Accuses Biden Admin of 'Dismantling' Enforcement*, FOX NEWS, <https://www.foxnews.com/politics/biggs-ice-arrests-biden-admin-enforcement-deportations> (July 6, 2021); Nick Miroff and Sean Sullivan, *As Immigration Heats Up, Biden Struggles for a Clear Plan*, THE WASHINGTON POST, https://www.washingtonpost.com/national/biden-immigration-policy-struggle/2021/07/17/5e8bb9b6-e67c-11eb-8aa5-5662858b696e_story.html (July 17, 2021).

though, as the Administration has continued to allow record numbers of migrants to disappear into the interior, many of whom will never show up for their court dates.⁵

The Administration knows that this is a failed practice, even worse than its use of the failed “Alternatives to Detention” policy which leads to the ultimate removal of few, if any, aliens at the end of their immigration court proceedings. But it has not made available for public consumption any statistics related to the failure of aliens to appear to receive their charging documents.

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. 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

The time frame for the following requests is January 20, 2021, until the date the records request is processed.

1. All records reflecting, referring, or relating to the rate at which aliens appear for their court dates after being issued a NTA.
2. All records reflecting, referring, or relating to compliance rates in “alternatives to detention” programs.
3. All records reflecting, referring, or relating to aliens’ ultimate compliance with final orders of removal, including records indicating how many aliens are present in the United States with final orders of removal.
4. All communications with the Department of Justice’s Executive Office of Immigration Review related to the rate at which aliens appear, or do not appear, for scheduled court dates.
5. All data and records provided to the Secretary of Homeland Security related to aliens appearing for immigration court proceedings, and the ultimate compliance rate with which aliens comply with orders of removal.
6. All records on which the Secretary of Homeland Security relied in formulating his testimony that the “appearance rate” among illegal border crossers is “very, very high,” a position he testified to on May 13, 2021, to the Senate Homeland

⁵ Dinan, *supra* note 3.

Security and Governmental Affairs Committee and on May 26, 2021, to the Senate Appropriations Committee.⁶

7. All records relaying the decision to end the practice of issuing NTAs, including any signed memorandum, guidance, policy, directive, or otherwise and all communications distributing that decision through the chain of command or to the workforce.
8. All records discussing, referring, or relating to paroling aliens with a NTA.
9. All records discussing, referring, or relating to paroling aliens without a NTA.
10. All communications with CBP relating to changing the practice for issuing a NTA to aliens apprehended along the Southwest Border.
11. All communications related to changing the practice of issuing a “Notice to Appear”, “Notices to Appear”, “NTA” or “NTAs” to aliens apprehended along the Southwest Border between individuals in any of the following components:
 - a. Office of the Secretary (Front Office)
 - b. Office of Strategy, Policy, and Plans (Policy or PLCY)
 - c. Office of the General Counsel (OGC)
 - d. Office of Legislative Affairs (OLA)
 - e. Office of Public Affairs (OPA)
 - f. Office of Partnerships and Engagement (OPE)
 - g. Office of Operations Coordination (Ops)
 - h. Office for Civil Rights and Civil Liberties (CRCL)
12. All communications related to changing the practice of issuing a “Notice to Appear”, “Notices to Appear”, “NTA” or “NTAs” to aliens apprehended along the Southwest Border in the possession of any of the following custodians:
 - a. Alejandro Mayorkas
 - b. David Pekoske
 - c. Karinda L. Washington
 - d. Marsha Espinosa
 - e. David Gersten
 - f. Karen Olick
 - g. Clarissa Kornell
 - h. Kelli Ann Burriesci
 - i. Michelle Brané
 - j. Sarah Peck
 - k. Heather Fluit
 - l. Katherine Culliton-González
 - m. Britton Yee

⁶ *Id.*

- n. Brian Hyer
- o. Jason Mayer
- p. Traci Silas
- q. Alexandra Carnes
- r. Harlan Geer
- s. Eva Millona
- t. Joel T. Meyer
- u. David Shahoulian
- v. Adam Hunter
- w. Serena Hoy
- x. Robert Paschall
- y. David Cloe
- z. Cass Sunstein
- aa. Any person not on this list who serves as a Chief of Staff, Deputy Chief of Staff, Counselor, or Advisor in the DHS Front Office or Policy.

13. All communications with any email address ending in “@who.eop.gov” related to changing the practice of issuing a NTA to aliens apprehended along the Southwest Border, detention policies, and compliance rates with court appearances or orders of removal.

III. Redactions

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.

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. Request for Expedited Processing

Your regulations provide for the granting of expedited processing to requests that demonstrate a compelling need. Your regulations say "Requests and appeals will be processed on an expedited basis whenever the component determines that they involve An urgency to inform the public about an actual or alleged federal

government activity, if made by a person who is primarily engaged in disseminating information; [or] . . . A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.”⁷ We are an organization primarily engaged in disseminating information, and there is an urgency to inform the public concerning Federal Government activity, including whether or not the Biden Administration is abiding by its constitutional obligation to “take care that the Laws be faithfully executed.”⁸ These laws include our immigration laws, and it seems that the Biden Administration is wholly disregarding this duty. This disregard has generated exceptional media interest about government integrity, and thus this request should be expedited. Further, this is a straightforward and simple document request that should take few resources to process.

V. Fee Waiver Request

We request a waiver of all applicable fees. 5 U.S.C. § 552(a)(4)(A)(iii) provides that you shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁹

In this case, a fee waiver is appropriate because of the public’s right to know whether their government is enforcing our nation’s immigration laws and protecting the integrity of our borders. To date, the information requested has not been released in any form to the public; its release in response to this request will therefore contribute significantly to public understanding of the operations of the government.

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 internal policies and practices with regard to the enforcement of our immigration laws 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.

VI. Record Preservation Requirement

We request that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been

⁷ 6 CFR § 5.5.

⁸ U.S. Const. art II, § 3.

⁹ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁰

VII. 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.

VIII. 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 FOIA@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 Hamilton

Gene Hamilton

America First Legal Foundation

¹⁰ *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).