



April 4, 2022

**Via Online Portal**

Douglas Hibbard  
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Office of Information Policy  
Department of Justice  
6th Floor, 441 G Street, N.W.  
Washington, D.C. 20530

**VIA Email**

Joseph R. Schaaf  
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Department of Justice  
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**Freedom of Information Act Request: Politicization of Immigration Enforcement**

Dear Mr. Hibbard & Mr. Schaaf:

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. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

**I. Introduction**

We are concerned that the Department of Justice (“DOJ”), at the express direction of Biden Administration political officials, is executing an open borders program that calls for, among other things, the unjustified dismissal of hundreds of thousands of immigration cases of aliens who are currently in immigration court proceedings. In doing so, DOJ, in conjunction with the Biden White House and the Department of Homeland Security, is engaging in a scheme to unlawfully circumvent and subvert valid statutory mandates and use “prosecutorial discretion” as the pretext for what basically amounts to administrative amnesty.

The Biden Administration’s actions have generally facilitated mass illegal immigration at unprecedented levels.<sup>1</sup> Deportations have dropped to record lows.<sup>2</sup> Now—in addition to facilitating this illegal conduct, which has resulted in at least 757,000 illegal aliens being released into the United States in 13 months<sup>3</sup>—the Biden Administration has opened a new front in its proverbial war on American citizens, American sovereignty, and the rule of law by coordinating on a plan to provide administrative **amnesty to as many as 1.5 million illegal aliens by simply ending their immigration court proceedings.** Not ordering removal when required by law, or providing relief to aliens when they are eligible, but simply taking the cases off the docket and pretending that they no longer exist.

As you know, the Executive Office for Immigration Review’s mission (“EOIR”) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the immigration laws. Under delegated authority from the Attorney General, EOIR is supposed to conduct immigration court proceedings, appellate reviews, and administrative hearings. As an office within DOJ, EOIR reports directly to the Deputy Attorney General.<sup>4</sup> As of January 19, 2021, EOIR reported 1,503,931 pending cases. And there is no reason to believe these numbers will decline in the coming months.<sup>5</sup> But rather than securing the border, adjudicating cases as promptly as possible, and finding efficiencies that prevent judges from having to adjudicate

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<sup>1</sup> Adam Shaw & Griff Jenkins, *Migrant Encounters at Southern Border in February Surged 63% Over Last Year: CBP Data*, FOX NEWS (Mar. 15, 2022) <https://www.foxnews.com/politics/migrant-encounters-southern-border-surged-february-cbp>; Eileen Sullivan and Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High*, THE NEW YORK TIMES (Oct. 22, 2021) <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html>. See also Luke Barr, *US Bracing for Influx of Migrants at Southern Border if Title 42 Revoke: DHS*, ABC News (Mar. 29, 2022) <https://abcnews.go.com/US/us-bracing-influx-migrants-southern-border-title-42/story?id=83751437>.

<sup>2</sup> See James Remsen, *Deportations Fell to 26-year Low Last Year, ICE Report Reveals*, NEW YORK POST (Mar. 11, 2022) <https://nypost.com/2022/03/11/deportations-fell-to-26-year-low-last-year-ice-report-reveals/>, Stephen Dinan, *ICE Arrests Plummeted Under Biden Guidance; Officers Averaged an Arrest Every Two Months*, THE WASHINGTON TIMES (Nov. 25, 2021) <https://www.washingtontimes.com/news/2021/nov/25/ice-arrests-plummeted-under-biden-guidance-officer/> (“ICE authorized just 20,858 arrests in the six months after the Biden administration announced new rules ... or an average of just one arrest every two months for each deportation officer ... down exponentially from the Trump years when the rate averaged two arrests each month, and it’s even worse compared to the peak Obama years, when the ration was about four arrests each month.”). See also Nick Miroff and Maria Aacchetti, *Immigration Arrests Fell to Lowest Level in More Than a Decade During Fiscal 2021, ICE Data Shows*, THE WASHINGTON POST (October 26, 2021) [https://www.washingtonpost.com/national/ice-arrests-biden-trump/2021/10/25/f33130b8-35b5-11ec-9a5d-93a89c74e76d\\_story.html](https://www.washingtonpost.com/national/ice-arrests-biden-trump/2021/10/25/f33130b8-35b5-11ec-9a5d-93a89c74e76d_story.html).

<sup>3</sup> See generally *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 4552546 (N.D. Tex. June 7, 2021) (Monthly status reports filed by DHS show that the total monthly releases by CBP and ICE total more than 757,000 releases of illegal aliens into the United States since February 2021).

<sup>4</sup> United States Department of Justice, About the Office, <https://www.justice.gov/eoir/about-office>.

<sup>5</sup> Executive Office for Immigration Review Adjudication Statistics, *Pending Cases, New Cases, and Total Completions*, (Jan. 19, 2022) <https://www.justice.gov/eoir/page/file/1242166/download> (showing continued, and accelerated) growth in pending cases.

frivolous cases, the Biden Administration appears to be abdicating its duty to interpret and administer the immigration laws fairly, expeditiously, and uniformly.

These efforts involve individuals from EOIR, such as Director David Neal, but are driven primarily by two individuals within the Office of the Deputy Attorney General: Lucas Guttentag,<sup>6</sup> and Margaret O’Herron. Ms. O’Herron and Mr. Guttentag have been meeting regularly with the White House’s Domestic Policy Council and other departments and agencies to coordinate actions and policies that frustrate the rule of law. Their efforts—which would facilitate the indefinite unlawful presence of hundreds of thousands of illegal aliens—have been largely unreported and undisclosed to Congress.

AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

Therefore, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a), AFL requests the records specified below.

## II. Custodians

- A. Lucas Guttentag (ODAG)
- B. Margaret (Margie) O’Herron (ODAG)
- C. Jill Anderson (EOIR)
- D. Charles Adkins-Blanch (EOIR)
- E. Mary Cheng (EOIR)
- F. Daniel Dougherty (EOIR)
- G. Jean King (EOIR)
- H. James McHenry (EOIR)
- I. Sheila McNulty (EOIR)
- J. David Neal (EOIR)
- K. Lauren Alder Reid (EOIR)
- L. Kate Sheehey (EOIR)
- M. Tracy Short (EOIR)
- N. Alexander Wang (EOIR)
- O. Dan Weiss (EOIR)
- P. David Wetmore (EOIR)

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<sup>6</sup> Anita Kumar, *Biden Taps Lawyer to Help Rescind Trump Immigration Policy*, POLITICO (Aug. 2, 2021) <https://www.politico.com/news/2021/08/02/biden-immigration-lawyer-502190>.

### III. Records Request

The timeframe for each request is July 1, 2021, to the date this records request is processed.

- A) For custodians A and B, all calendar items that contain the terms “DPC” or “Domestic Policy Council” and “Immigration”.
- B) For custodians A and B, all records containing the phrases “immigration court backlog”, “EOIR court backlog”, or “low priority”.
- C) For custodians A and B, all records of e-mail communications with any email domain ending in “eop.gov”, “hq.dhs.gov”, “ice.dhs.gov”, and/or “cbp.dhs.gov” mentioning or relating to either proposed changes in EOIR processes or identification/prioritization of cases.
- D) For all custodians, all records mentioning or relating to “immigration court backlog” or “low priority” cases.
- E) For all custodians, all records related to any proposal to allow EOIR judges to administratively close, dismiss, terminate, or otherwise dispose of cases pending before them other than through adjudication on the merits.
- F) For all custodians, all records related to any proposal to amend or change the process by which EOIR judges are assigned cases, to include any plan or proposal to establish new dockets or allow judges to select the individual cases over which they want to preside.

### IV. 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, the Department of Justice 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, Department 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.

## **V. Fee Waiver Request**

Per 5 U.S.C. § 552(a)(4)(A)(iii), 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. This has previously been recognized by the Departments of Defense, Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

## **VI. Request for Expedited Processing**

AFL requests expedited processing for items A and B of this request from OIP and part D of this request from EOIR. In support thereof, AFL certifies its compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e), which provides in relevant part:

(e) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve: ... (ii) 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 (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

As other federal agencies have acknowledged in granting AFL expedited processing, AFL is primarily engaged in disseminating information. Additionally, there is an urgency to inform the public regarding the circumstances surrounding the Department of Justice's planned systematic closure of cases as a means of circumventing the Immigration and Nationality Act and the rule of law. This is a matter of pressing national importance as once it is done, it cannot be undone.

Our request also meets the Department's regulatory test for expedited processing. Specifically, the request satisfies § 16.5(e)(1)(iv), providing for expedited processing whenever it is determined that the request involves a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence. As already discussed, both requirements are met here, because there has been extensive public interest in the border, and because the government's ability to maintain a sovereign border as required by law clearly impacts the confidence of the public in the government's integrity. The government's deliberate choices to throw the border open and its refusal to enforce the law as written drastically undermine the confidence of the public in the integrity of the government. This request seeks to expose these circumstances to public inspection, before irreparable harm is done to the nation's interests, in violation of the law.

DOJ that it is required to engage in reasoned decision-making when evaluating requests for expedited processing, and "mere recitation of the language in the DOJ provision on expedited review does not suffice as a reasoned explanation."<sup>7</sup> Instead, DOJ is required to engage with the claims made, and grant them when the relevant tests are satisfied. If DOJ denies them with a "mere recitation of the language in the DOJ provision on expedited review", that decision can be challenged in federal court, without the need to wait for administrative exhaustion. After all, "to require a requestor who has been denied expedited processing to exhaust administrative remedies before seeking judicial review would defeat the section's aim of accelerating response time."<sup>8</sup>

AFL is an organization engaged in gathering, analyzing, and disseminating information, and there is great urgency to inform the public concerning events of intense public interest. Moreover, the allegations at hand go directly to public confidence in the government's ability to remain a sovereign. For these reasons, our expedited processing request should be granted.

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<sup>7</sup> *Citizens for Resp. and Ethics in Washington v. U.S. Dept. of J.*, 436 F. Supp. 3d 354, 359 (D.D.C. 2020).

<sup>8</sup> *Id.*

## **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, 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, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

## **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](mailto: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.

Sincerely,

/s/ Reed D. Rubinstein  
Reed D. Rubinstein  
America First Legal Foundation